# Supreme Court of the United States

OCTOBER TERM, 1967

No. 699

JOHN EARL CAMERON, *et al.*,

*Appellants,*

—v.—

PAUL JOHNSON, ETC., *et al.*

## BRIEF FOR APPELLANTS ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, HATTIESBURG DIVISION

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### Opinions Below

This case is before the Court for a second time. The *per curiam* and dissenting opinions of this Court which remanded the case to the three-judge Federal District Court for reconsideration in light of *Dombrowski* v. *Pfister*, 380 U. S. 479, are reported at 381 U. S. 741. The original majority and dissenting opinions of the three-judge Federal District Court for the Southern District of Mississippi, Hattiesburg Division, are reported at 244 F. Supp. 846 (S. D. Miss. 1964) and are set forth in the Appendix at Pages 20 and 31. The opinions of the District Court in response to the remand mandate of this Court are reported at 262 F. Supp. 873 (S. D. Miss. 1966). The majority opinion of Circuit Judge Coleman and District Judge Cox on remand is set forth in full in the Appendix at Page 41. The special concurrence of District Judge Cox

is set forth in full in the Appendix at Page 51. The dissenting opinion of Circuit Judge Rives on remand is set forth in full in the Appendix at Page 58.

## Jurisdiction

The judgment and order of the District Court were entered on December 23, 1966. A notice of appeal to this Court was duly filed with the Clerk of the United States District Court for the Southern District of Mississippi on January 20, 1967. Probable jurisdiction was noted on Oct. 9th, 1967. Jurisdiction of this appeal is conferred on this Court by Title 28 U. S. C., Section 1253.

## Statutes Involved

The validity of Mississippi House Bill No. 546, Laws of 1164, 1964 session of the Mississippi Legislature, approved by the Governor of Mississippi on April 8, 1964, is here involved. [Section 2318.5, Mississippi Code Annotated 1942 (1964 Supp.).] The text of this Mississippi state statute is as follows:

> AN ACT TO PROHIBIT THE UNLAWFUL PICKETING OF STATE BUILDINGS, COURTHOUSES, PUBLIC STREETS, AND SIDEWALKS.
>
> Be it enacted by the legislature of the State of Mississippi:
>
> Section 1. It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or [unreasonably] interfere with free ingress or egress

to or from any public premises, State property, county or municipal courthouses, city halls, office buildings, jails, or other public buildings or property owned by the State of Mississippi or any county or municipal government located therein or with the transaction of public business or administration of justice therein or thereon conducted or so as to obstruct or [unreasonably] interfere with free use of public streets, sidewalks or other public ways adjacent or contiguous thereto.

Section 2. Any person guilty of violating this act shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than Five Hundred Dollars ($500.00), or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

Section 3. This act shall take effect and be in force from and after its passage.

NOTE: The word "unreasonably" in brackets in the text was added by amendment to the Statute on July 9, 1964.

The federal statutes involved in this case are:

*28 U. S. C. § 2283 Stay of State court proceedings.*

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

*42 U. S. C. § 1983 Civil action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceedings for redress.

## Questions Presented

1. Whether Title 28 U. S. C. Section 2283 bars a federal injunction in this case?

2. Whether equitable relief is proper in light of the criteria set forth for such relief in this Court's decision in *Dombrowski* v. *Pfister,* 380 U. S. 479?

a) Whether the record of the remand hearing shows that the Mississippi statute here challenged has been selectively enforced in violation of the First and Fourteenth Amendments requiring federal injunctive relief in light of the criteria set forth in *Dombrowski*?

b) Whether the record of the remand hearing requires a conclusion that the Mississippi statute here challenged is overly broad and vague in the area of the First Amendment requiring federal injunctive relief in light of the criteria set forth in *Dombrowski*?

c) Whether the record of the remand hearing shows that the Mississippi statute here challenged has been applied "for the purpose of discouraging protected activities" requiring injunctive relief in light of the criteria set forth in *Dombrowski*?

## Statement of the Case

### Proceedings Below

1. This case is now before the Court a second time. After a decision by the original three-judge court, reported at 244 F. Supp. 846, an appeal was brought to this Court. In a *per curiam* opinion, the Court remanded the case to the district court "for reconsideration in light of *Dombrowski* v. *Pfister,* 380 U. S. 479". On remand the District Court was directed to consider "(1) Whether 28 U. S. C. §2283 bars a federal injunction in this case", and (2) if §2283 is not a bar, whether injunctive relief is appropriate in light of the criteria set forth in *Dombrowski. Cameron* v. *Johnson,* 381 U. S. 741 (1965). This is an appeal from the majority opinion and order of the three-judge Federal District Court rendered in response to the 1965 mandate of this Court.

Appellants originally instituted a plenary federal action on April 13, 1964, pursuant to Title 42 U. S. C. §§1971, 1983 and 1985 seeking a declaratory judgment and injunction against the enforcement of House Bill 546, 1964 session of the Mississippi Legislature, entitled "An act to prohibit the unlawful picketing of State buildings, courthouses, public streets and sidewalks." The bill was approved by the Governor on April 8, 1964, and was enforced by multiple arrests beginning on April 10, 1964. A three-judge district court was duly convened by the Chief Judge of the Court of Appeals for the Fifth Circuit. A hearing was held on April 29, 1964, on an application for an interlocutory injunction, but decision on that application was not required because of an agreement of the Attorney General of Mississippi to secure the postponement of trials for prosecutions under the statute until at least July 15, 1964.

An amended complaint in the nature of a class action (App. 7) and answers thereto were filed (App. 14, 16, 18) and the cause was submitted for final decree upon the amended complaint, the answers and affidavits filed by both appellants and appellees. No oral evidence was adduced. On July 11, 1964, a majority of the District Court entered an opinion and judgment dismissing the amended complaint. Circuit Judge Rives filed a separate dissenting opinion (App. 31).[1]

On appeal to this Court, the judgment of the District Court was vacated "and the cause remanded for reconsideration in light of *Dombrowski* v. *Pfister*, 380 U. S. 479". Mr. Justice Black filed a dissenting opinion, joined in by Mr. Justice Stewart, and Mr. Justice Harlan. Mr. Justice White filed a separate dissenting opinion.

On October 15, 1965 a full hearing was held before the District Court at which oral testimony was adduced for the first time in the proceeding (App. 105 to 284).

On December 24, 1966, the majority of the District Court entered an opinion, conclusions of law, and a judgment dismissing the cause (App. 41, 56, 90). The majority of the District Court, Circuit Judge Coleman (replacing Judge Mize on the Court, then deceased) and District Judge Cox, found in response to the questions posed by this Court in the remand order that (1) 28 U. S. C. §2283 barred a

[1] Subsequent to the district court's opinion, all of the state prosecutions involved in this case were removed under 28 U. S. C. A. 1443 to the federal courts. Following the opinion of this Court in *City of Greenwood* v. *Peacock*, 384 U. S. 808 (1966), these cases were remanded to state courts. *Hartfield, et al.* v. *Mississippi*, 363 F. 2d 869 (5th Cir. 1966). They were subsequently stayed by the three-judge court and have presently been stayed pending the outcome of the appeal to this Court.

federal injunction in this case as to the "pending" state criminal proceedings and (2) that further injunctive relief as to future prosecutions under the state statute should not be granted.

The majority held that prospective injunctive relief was inappropriate in that the statute is not "so broad, vague and indefinite and lacking in definitely ascertainable standards as to be void on its face" (App. 48-49). As to the uncontested evidence adduced at the October 15th hearing that the statute had been selectively enforced by the State authorities, cf. *Cox* v. *Louisiana,* 379 U. S. 536, the majority held that "we are not here dealing with parades carried on by common consent on the public streets" (App. 49). Accordingly, the majority held that "under all the facts and circumstances of this case the principles announced in *Dombrowski* have not been brought into play [and] that injunctive or declaratory relief as to future enforcement of the statute is not justified" (App. 49). The majority further declined to exercise equitable jurisdiction on the ground that today in Mississippi, "Picketing to obtain the vote or to encourage others to do so is a thing of the past" (App. 50). The concurring opinion of District Judge Cox additionally concluded that the statute is not related "to impinging upon any First Amendment rights of these plaintiffs" (App. 53).

Circuit Judge Rives, dissenting, would have found in response to the questions posed by this Court that (1) 28 U. S. C. §2283 is no bar to a federal injunction in this case and (2) that injunctive relief was proper in light of the criteria set forth in *Dombrowski.* Circuit Judge Rives would have concluded "that an inspection of the record in this case clearly shows that section 2318.5 [House

Bill 546] was unconstitutionally applied. Moreover, the application of the statute in this case illustrates how vague the statute really is and compels the conclusion that it is unconstitutional on its face" (App. 75). Judge Rives further would have found that "This is a case of selective enforcement. . . . If there is anything 'consistent' or if any 'uniformity' appears in this record, it is that section 2318.5 was consistently used to harass the civil rights movement in Hattiesburg" (App. 81). Circuit Judge Rives would have concluded accordingly, in response to the mandate of this Court, that injunctive relief was appropriate in light of the criteria of *Dombrowski*.

A notice of appeal was taken to this Court (App. 91) and subsequent thereto an order was entered by Circuit Judge Coleman staying all pending criminal prosecutions pending disposition of the appeal by this Court. Probable jurisdiction was noted on October 9th, 1967.

**2. *Statement of the Facts***

Unlike the previous appeal to this Court, the case is now bottomed upon a full evidentiary hearing in the district court. The largely uncontested evidence developed at the hearing on the remand now permits consideration of the important issues of this case against the background of a fully developed factual record. The facts here set forth emerge from this record.

The demonstrations which resulted in the arrests and prosecutions under Section 2318.5 had their origin during January of 1964. For several days prior to January 22, the Council of Federated Organizations, hereafter referred to as COFO, the coordinating Council of Mississippi civil

rights organizations (App. 245), together with the Hattiesburg Ministers' Project for the National Council of Churches (App. 111, 159) distributed leaflets announcing that January 22nd would be "Freedom Day" in Hattiesburg and that a rally would be held to include peaceful picketing in order to protest racial discrimination in voter registration and to encourage Negro citizens to attempt to register to vote (App. 141, 156-57, 159, 165-66, 185, 191, 218, 223-24, 228, 245).

On January 22nd several hundred persons, Negro and white gathered near the courthouse, as did reporters from the local and national press. The purpose of the demonstration was, as announced, to protest racial discrimination in voter registration and encourage Negro citizens to attempt to register to vote (App. 191, 245). The courthouse was the site of registration. The demonstrators began to march around the courthouse and in doing so they may have interfered with the main entrance to the court building (App. 246). In order to facilitate access to the building, the County Sheriff then designated a "march route" which the demonstrators followed in picketing the courthouse (App. 219-20, 224, 246).

In order to facilitate access to the building the police set up barricades "upon the north and south side of the main sidewalk into the courthouse blocking that area off so that it [the picket line] would not block the main entrance to the Courthouse—and these people [were] allowed to picket unmolested within that given area" (App. 246). Thus, in order to facilitate access to the courthouse, the Sheriff had blocked off a small area to the right of the main entrance where picketers were allowed to continue

their activities (App. 144-43, 197, 220, 224, 246).[2] The demonstrators confined their picketing to this designated area and with tacit police and Sheriff "approval" the picketing continued subsequent to January 22. During the early period of picketing in February the demonstrators sang, chanted, prayed and preached (App. 219, 224, 245-46).

Picketing continued, although with fewer demonstrators into April of 1964. It is uncontested that from April 1 until April 9th pickets were present every day except Sundays and the number varied from 7 to 20 (App. 148, 140, 167, 220, 225, 246). One witness testified that at times it reached as many as 38 or 39 (App. 224).

Unlike the earlier mass picketing where hundreds were present, the picketing in April was entirely quiet. The pickets did not sing, chant, pray or preach. "The only noise" they "made was an occasional comment to one another in normal conversation." They in no way made any noise that would disturb the transaction of business within the courthouse (App. 123-26, 159-60).

The pickets marched steadily but slowly. They made it a point to be courteous to persons desiring to pass them and never blocked anyone from passing them (App. 169). This was the situation which persisted without incident until April 9 (App. 245-248).

On April 8, 1964, the legislature of the State of Mississippi passed, and the Governor signed, House Bill 546, "An Act to Prohibit the Unlawful Picketing of State Buildings, Courthouses, Public Streets and Sidewalks". On

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[2] Since in Circuit Judge Rives' words "it is difficult to verbalize the scene", he reproduced in his opinion a scale drawing (App. 71). We do not understand appellees to contest its accuracy.

April 9, 1964, House Bill 546 was delivered by messenger from the State Capitol to the law enforcement officials of Forrest County Mississippi (App. 254-55).

Mr. James Dukes, Forrest County Attorney, Mr. Bud Gray, Forrest County Sheriff and a Forrest County Deputy Sheriff, immediately upon receipt of the Bill went to the site of the demonstration.

On that day a small group was picketing, confining as usual their march to the area within the barricades erected months before by the Forrest County law enforcement authorities (App. 143-44). As was their usual practice, the demonstrators started "to disband the picket" line around four o'clock. At that moment several police officers arrived and "began to break down the wooden barriers" which had previously delineated their line of march. Sheriff Gray accompanied by Mr. Dukes, the County Prosecuting Attorney, and Deputy Morgan approached the group asking for their attention. A copy of section 2318.5, which had just been passed by the Mississippi legislature and had just been received in Hattiesburg, was read to them. The Sheriff then gave them five minutes in which to disperse, which they did (App. 121, 144, 160-61, 246-248).[3]

On the morning of April 10, approximately thirty-five to forty persons appeared to resume their daily peaceful picketing activity (App. 129, 199, 209). This number in-

[3] The majority opinion below, perhaps inadvertently, creates the clear impression of restrained forbearance on the part of the state officials in enforcing the statute against appellants. Thus the majority in its statement of "facts" says, "At last, on April 10, 1964, the Sheriff read the statute to the participants and warned them that if they violated it he would have no choice but to arrest them" (App. 44). The majority does not mention that the statute was *only passed* on April 8th and rushed to Hattiesburg for immediate application (App. 121, 143-44, 161, 246-47).

cluded not only citizens of Hattiesburg but also northern clergymen who had come to Mississippi in response to a call from the National Council of Churches to assist and encourage non-discriminatory voter registration in that State (App. 112, 141, 142, 158-59).

The demonstrators assembled shortly after 9 A.M. at the COFO headquarters. They lined up approximately 10 feet apart and walked to the Courthouse (App. 147).

The pickets arrived at the corner across from the Courthouse at about 10 A.M. where they found a normal flow of traffic. They "waited to cross the street until the policeman had halted traffic as he did for all pedestrians." They "crossed with other pedestrians and then began to march in the area previously designated for picketing in a very orderly fashion. Because of the previous afternoon they were "more frightened" than before and "for that reason" they "were more orderly and quiet" than previously (App. 122, 162, 179, 192, 249-250).

When they arrived at the courthouse, the demonstrators were met by crowds of whites who had come to view the anticipated arrests (App. 122-23, 144-45, 161-62, 174-75). These onlookers filled the sidewalks of the streets around the courthouse and spilled over onto the steps of the courthouse making access to the building through the main entrance impossible (App. 122-23, 144-45, 161-62, 174-75).[4]

On their arrival at the courthouse the demonstrators discovered that the police barricades, which had been erected and left in place since January, to delineate the permissible march route, had been removed (App. 121). The demonstrators nevertheless proceeded to the exact site

[4] None of these spectators was arrested for violation of House Bill 546 (App. 145, 162, 267).

patrolled by them since January and there began their orderly circling of the area (App. 122-23). Within minutes all the demonstrators were ordered to proceed to the sheriff's office under arrest for violation of House Bill 546.[5]

The picketers were then placed in jail for obstructing free ingress to or egress from the courthouse.[6] At the time of the arrest the area immediately adjacent to the picketing area was congested with spectators. There were 20 or 25 people standing on the main steps of the courthouse and a "tight knot of people" were "blocking the sidewalk." None of these persons were arrested or asked to move on (App. 122-23, 144-45, 161-62, 171-72, 174-75).

Although the appellants were arrested for demonstrating and mass picketing "so as to obstruct the entrance to the courthouse" (opinion of Judge Rives, (App. 74, 125)) there was virtually no testimony at the hearing to prove actual obstruction. The defendants produced one witness who testified that in making her way along the sidewalk to the courthouse entrance on the morning of April 10, 1964, she was "weaving back and forth" in and out of the picket line for a distance in order to reach the door (App. 270). This was the only witness brought forward by defendants to "prove" plaintiffs' violation of House Bill 546. As Circuit Judge Rives noted in his dissenting opinion, "Whatever 'obstruct' may mean, here, clearly Mrs. Burkett was not

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[5] The testimony as to whether any warning was given them is in some dispute. The appellees' witnesses testified that Sheriff Gray warned the pickets that they were violating section 2318.5, and when they failed to disperse he placed them under arrest (App. 250-51). Appellants' witnesses testified that they were placed under arrest without warning or that, in any event, if there was a warning they did not hear it (App. 123-24, 163, 177, 201, 221).

[6] No question of resisting arrest was involved in any way (App. 124).

blocked or prevented from making her sojourn to the County Agent's Office. Nor is there a single shred of evidence that the pickets were unwilling to let persons pass at any time before or during the demonstration" (App. 76).[7]

[7] The majority of the District Court held that "the blocking of the sidewalks and entrances and interfering with the free use of the courthouse sidewalks and entrances was the gravamen of the offense" (App. 44). Circuit Judge Rives' description of the record testimony of "obstruction" is in great detail and is in no way contradicted by the majority in any specifics (App. 76): "The main thrust of the defendants' argument is that the pickets obstructed the entrance to the County Court Room, designated as 'B' on the drawing, and the entrance to the Home Demonstration Office, designated as 'A' on the drawing. I will treat the Home Demonstration Office first.

"The Home Demonstration Office is a small office with only one entrance. It has no inside entrance to the interior of the Courthouse. Mrs. Pearl Burkett is the Home Demonstration Agent. She leaves her office and goes to the County Agent's office about four or five times each day (App. 269). To get there, she leaves her office and proceeds along the walk to the main steps of the Court House and proceeds up those steps to the second floor. The sidewalk at one point narrows to as little as 3.8 feet.

"On the morning of April 10 during the picketing, Mrs. Burkett found it necessary to go to the County Agent's office. She testified (App. 270): 'I started the regular route and they were so close together that I had to wait for just a moment to get in line and I fell in line with them and started weaving back and forth until I reached the front steps and then dropped out of the line.' Her testimony is, of course, the only real testimony of obstruction contained anywhere in the record (App. 124). While the walkway is wide enough at most points for her to walk past the pickets, for about six feet it is only 3.8 feet wide. To be comfortable one would most likely have to walk single file in line, one person behind another, at that point. Thus, she had to weave back and forth by falling 'in line with them' for a few steps. They were not discourteous; she was not bumped or molested; they were peaceful and orderly. Whatever 'obstruct' may mean, here, clearly Mrs. Burkett was not blocked or prevented from making her sojourn to the County Agent's Office. Nor is there a single shred of evidence that the pickets were unwilling to let persons pass at any time before or during the demonstration.

"In the past the pickets had seen persons come out of the main steps to the Court House and pass them and the Home Demonstration Office on their way to the parking area behind the Court House

Furthermore on that afternoon, April 10, 1964, a Hattiesburg resident, Mrs. Mary Williams, accompanied by nine school-age youngsters appeared at the previously designated march area near the courthouse to continue the peaceful picketing (App. 182-83). Within moments of their

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(App. 120, 142). The pickets were never told that they blocked the Home Demonstration Office door. One witness recalled Mrs. Burkett passing them on the way into her office on several mornings. She would greet them 'cordially' (App. 142). Another picket recalled at least three persons 'who had easy access to that door ['A'] who walked by me on the way to business in that particular office' (App. 160, 167). These earlier instances are of continuing importance since Mr. Dukes testified that had the law been in effect, the earlier picketing would have violated it (App. 257).

"The problem of blocking the entrance to the County Court Room is even clearer. Reverend Brown, like the other witnesses for the plaintiffs, testified that the entrance to the County Court Room was never blocked (App. 114, 119, 169, 141-42, 159-60, 167). The defense presents an appealing picture as to the blocking of entrance 'B'. Mr. Selby Bowling, President of the Forrest County Board of Supervisors, was attracted by 'curiosity as much as anything else' to the steps of the Court House on the morning of April 10, where he watched the arrest of the demonstrators who he described as a 'nuisance' (App. 276). The reason entrance 'B' must be kept open is, according to Mr. Bowling, that 'there are a lot of elderly people who use that and catch the elevator to go to the second floor.' This use of the ground floor elevator, in his 'opinion' was prevented by the pickets (App. 277-78). 'Of course, the Court House is symmetrical and there is an entrance to the County Court Room, identical to the one marked 'B', on the opposite side of the Court House steps, which entrance is marked 'R' in the drawing, p. 11, *supra*. This entrance was in no way affected by the picketing. Surely we cannot silence a peaceful group in the orderly exercise of their freedom of speech just because they pass in front of one of several entrances to a court house (App. 125-26). Here, entrance 'R' was available, or the main entrance, or even the back entrance from the parking lot.

"The only evidence in this record of this blockage of entrance is the testimony of Mr. Dukes, who testified that, prior to the arrests on the morning of April 10, he tested the obstruction by attempting to walk against the current on the line of pickets. He said he could not (App. 250). I do not find this testimony sufficient to overcome the weight of all the other testimony contained in this record" (App. 75-78).

arrival, they too were ordered to jail (App. 183-84). There were *no* witnesses called by Appellees to testify to any obstruction on this occasion. As noted above, the one witness who spoke of "weaving" her way into the courthouse (App. 270), spoke of the *morning* of April 10. No one gave any evidence of obstruction at all on the afternoon of April 10 when these ten additional demonstrators were arrested.

Further arrests occurred on the morning of April 11, 1964. On that day, nine demonstrators appeared at the prior designated area and began to march peacefully (App. 209). Upon being warned by the sheriff that they were violating the new anti-picketing statute, two of the demonstrators left (App. 209). As the remaining seven people continued to walk slowly around the march route, they too were arrested (App. 209). Again there was no testimony by anyone relating to obstruction on this occasion.

The picketing continued six days a week from April 11 through May 17. In that period, no arrests for violation of House Bill 546 were made (App. 227, 252).

On May 18, 1964, nine demonstrators were picketing, as always within the previously designated march area at the side of the courthouse (App. 263-64). All nine of them were arrested for violation of House Bill 546. There, again, there was *no* evidence given by any witness of obstruction or blocking ingress to or egress from the courthouse.[8] After the arrests of May 18th, all picketing stopped (App. 211).

[8] It is of some interest that the majority opinion below does not even mention the arrests made on April 10 in the afternoon, on April 11 and on May 18. As a result, the majority does not discuss the significance of the total lack of evidence of obstruction on all

Furthermore, the record is uncontested that the Mississippi statute here challenged has been selectively enforced only against civil rights demonstrators. Subsequent to the civil rights arrests here detailed, several "parades have been held in Hattiesburg" (App. 195, 235-36, 264-65). On these occasions, the streets of the downtown area of the City, including the locale of the courthouse, have been cordoned off during daytime business hours and the sidewalks have been obstructed by crowds of spectators viewing the parades (App. 195, 235-36, 264-65).

On direct examination, plaintiff Reverend John Cameron testified that "there have been several school parades through . . . the main area of the City", and that "[t]he

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of these occasions. Cf. *Thompson* v. *Louisville*, 362 U. S. 199. Again, Circuit Judge Rives' detailed analysis of the factual record as to these arrests is uncontested by the majority:

"The danger occasioned by section 2318.5 is made even more evident when we examine the further arrests made on the afternoon of April 10, on April 11, and on May 18, not one of which groups exceeded 10 persons. These pickets were arrested because they walked so closely together that no one could pass between them, thus they obstructed ingress to and egress from the Court House.

"Picture 10 persons walking very closely together, which would occupy a space of about 16 to 20 feet. Now picture this group at the point where I have marked 'T' on the drawing, just above and to the left of the flag pole. If they were there, the entire remainder of their route would be left open both in front and in back. Can these people logically be arrested for obstructing points 'B' and 'A' when the majority of their time in walking about the flag pole will leave the walkways totally unobstructed? I think not.

"To illustrate, take the group arrested on the afternoon of April 10. Mrs. Mary Williams went to the Court House with a group of nine other persons, ranging in age up to 18 or 21. The 10 of them then proceeded to picket around the flag pole. Mrs. Williams testified (App. 184):

> Q. Did anybody try to go in or out of the court house while you all were there? A. No, they didn't, wasn't no one there to enter the court house, we were just on the line picketing.

They were arrested for obstructing ingress to and egress from the Court House under section 2318.5" (App. 78-79).

streets were blocked off in order for the parade to proceed" (App. 195). In conducting cross examination, Mr. Wells, Assistant Attorney General, of the State of Mississippi commented, "Well, they weren't demonstrations and picketing type parades [sic] it was just a parade like most cities and towns have" (App. 195).

The County Prosecuting Attorney, Mr. Dukes, appearing as a witness for the defendants fully conceded the selective enforcement of the statute in the following testimony:

> "Q. Now. Mr. Dukes, have there been any parades in Forrest County particularly in Hattiesburg since the arrests of May 18th? A. Yes, sir, parades schools (sic) which included white and colored bands, school children, cheer leaders, floats and so forth.
>
> Q. Do these parades ever block the streets? A. Well, I am sure they did but I didn't ever hear anybody complain about it though.
>
> Q. Did you ever advise Bud Gray [the Sheriff] that they were in violation of this statute? A. No, sir, because I was informed they had permission of the City, the mayor and commissioners.
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> Q. Now does this statute contain anything about getting a permit to hold a parade? A. No sir, sure doesn't" (App. 264).

Cf. *Cox* v. *Louisiana*, 379 U. S. 536.[9]

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[9] Although both Mr. Dukes and Mr. Wells advert to the fact that these other demonstrations took place with the permission and concurrence of the city officials it should be noted that House Bill 546 contains no provision for obtaining a license or other approval for demonstrations and the record contains no mention whatever of any other parade licensing provision under which the community demonstrations were authorized. Cf. *Cox* v. *Louisiana, supra,* at 556.

Mr. Wells, the Assistant Attorney General of the State, further characterized the "parades" which are permitted by the State authorities in the following manner in cross-examining Reverend Cameron, one of the Appellants:

*"By Mr. Wells:*

"Reverend Cameron, these parades you are talking about are parades where people had made arrangements with the City to participate and have just what's a normal parade like you have a parade for the fair and Christmas and things like that, wasn't it?" (App. 195).

Again in the cross-examination of Reverend Cameron, the Assistant Attorney General made amply clear the underlying motivation of the selective enforcement of the statute:

"Q. You don't class that kind of parade in the same category as picketing around a court house, do you?

[objection was overruled]

Q. You don't put that in the same class with the type of picketing you all were doing, do you? A. Well, it was not for the same purpose.

Q. That's right." (App. 196).

The majority of the District Court does not dispute the factual concessions of selective enforcement of the statute by the Appellees. They merely conclude that these tolerated activities which admittedly obstruct the streets are "customarily enjoyed by the community as part of ordinary community activities" and that they are "parades carried on by common consent on the public streets" (App. 49).

The essential uncontested facts which emerge from a detailed examination of the record of the evidentiary hearing which now bottoms this appeal are:

1. The demonstrations, which continued over a period of approximately four months for the purpose of protesting discrimination against Negro citizens in voting and encouraging Negro citizens to register to vote, were at all times entirely peaceful.[10]

2. The demonstrators at all times remained within the express area designated originally by the law enforcement officers who had selected that area so that the demonstrators, while marching, would not obstruct access to the courthouse.

3. The statute here under challenge, as conceded by the appellees in open court, has been selectively enforced so as to arrest only persons engaging in these activities and to deter others from undertaking such activities.

## Summary of Argument

As in *Dombrowski* v. *Pfister*, 380 U. S. 479, this appeal once again calls upon the Court "to settle important questions concerning federal injunctions against state criminal

[10] The peaceful and dignified character of the picketing on the critical morning of April 10th is evidenced in the pictures of the demonstrators (App. 95, 96, 98) taken, according to Mr. Wells, Assistant Attorney-General of Mississippi, and counsel for appellees, "a short time, a very short time prior to the arrests" (App. 117). These pictures were originally filed in this action as exhibits attached to affidavits introduced on behalf of the defendant state law enforcement officers. Copies were furnished to plaintiff-appellants' counsel by appellees and were introduced, "without objection" by the defendant-appellees (App. 117), by the plaintiff-appellants as plaintiffs' exhibits at the hearing below.

prosecutions threatening constitutionally protected expression" 380 U. S. at 483. The case is before the Court for the second time. In the original appeal to this Court, the cause was remanded for reconsideration in light of *Dombrowski* and the district court was directed to consider two questions: (1) whether 28 U. S. C. Section 2283 bars a federal injunction in this case and (2) if Section 2283 is not a bar, whether injunctive relief is appropriate in light of the criteria set forth in *Dombrowski*. These questions involve serious considerations affecting the duties and responsibilities of the Federal Judiciary in protecting the free exercise of fundamental constitutional freedoms.

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## —I—

Title 28 U. S. C. Section 2283, the federal anti-injunction statute, does not bar a federal injunction in this case.

1. Section 2283 is a codification and statutory reflection of the rules of comity and must be read in conjunction with the judicial principles developed to govern the Federal system. *Dombrowski* v. *Pfister* teaches that a federal court of equity has the power and duty, within the principles governing the federal system, to restrain a state court criminal proceeding which "unaffected by the prospects of its success or failure" creates a "chilling effect upon the exercise of First Amendment rights" 380 U. S. at 487. Accordingly an injunction against such a state court criminal proceeding is not *barred*, but is rather *required*, under the rules of comity which govern the federal system and are embodied in the federal anti-injunction statute, Section 2283.

2. The prior decisions of this Court support the conclusion that an injunction against a state criminal proceeding which meets the *criteria* of *Dombrowski,* and is brought under Title 42 U. S. C. 1983, the 1871 Civil Rights Act, is an injunction "expressly authorized by Act of Congress" and therefore an exception to Section 2283.

3. One of the central statutory purposes for the enactment of Section One of the 1871 Act "to enforce the Fourteenth Amendment", the forerunner of Section 1983, was to create a federal remedy which could protect the race of freedmen from abuse and perversion of state court machinery in the Southern states resulting in a deprivation of their newly granted constitutional and statutory rights. Section 1983 was thus designed to be a principal weapon in the struggle for federal primacy in the protection of fundamental national constitutional rights. It should be interpreted today "in accordance with its historical design", which "remains vital and pertinent to today's problems". *United States* v. *Price,* 383 U. S. 787 (1966).

4. This Court has already indicated in *City of Greenwood* v. *Peacock,* 384 U. S. 808 (1966) that Section 2283 would not bar injunctive relief in this case. In *Peacock,* the Court indicated clearly that a *Dombrowski* injunction was a "remedy available in the federal courts" to restrain a state prosecution or trial which "would itself deny their [the petitioners] rights protected by the First Amendment" 384 U. S. at 829. Both majority and dissenting Justices appear to agree on the availability of an injunction against pending state criminal proceedings if the criteria set forth in *Dombrowski* are present.

—II—

Equitable relief is proper in light of the criteria set forth in *Dombrowski.*

*Dombrowski* sets forth two separate and distinct categories of circumstances in which the exercise of federal equity power to restrain state criminal proceedings is appropriate. The first branch of *Dombrowski* relates to situations in which state statutes are challenged on their face as "overly broad and vague regulations of expression". 380 U. S. at 490. The second branch of *Dombrowski* relates to situations in which state statutes may be otherwise valid but are being "applied for the purpose of discouraging protected activities" 380 U. S. at 490. State proceedings, threatened or brought, under either of these two branches, create a "chilling effect upon the exercise of First Amendment rights" 380 U. S. at 487, properly invoking federal equitable relief.

The question as to whether relief is proper in this case in light of the criteria of *Dombrowski* now comes to the Court for the first time based upon a full evidentiary record. This record reveals that under the criteria set forth in both branches of *Dombrowski* injunctive relief is proper and necessary.

1. The uncontested evidence at the remand hearing now reveals that the Mississippi statute here challenged was selectively enforced by the state authorities in violation of the First and Fourteenth Amendments. The uncontested evidence of selective enforcement is even stronger than the evidence which led the Court to strike down the Louisiana "obstruction" statute in *Cox* v. *Louisiana,* 379 U. S. 536. The record reveals that this pattern of enforcement of the

state statute has resulted in "an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment" and permits "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendment". *Cox* v. *Louisiana*, 379 U. S. at 581 (concurring opinion of Mr. Justice Black).

2. The pattern of enforcement indicating the "setting in which the statute operates", *NAACP* v. *Button*, 371 U. S. 415, developed at the hearing, as well as the insertion of the word "unreasonably" in the statute by legislative amendment after the first appeal was considered, raise new and serious questions of unconstitutional vagueness and overbreadth beyond those considered by those members of the Court who touched on constitutional questions in their opinions in the first appeal. This new dimension renders the statute "so broad as to be unconstitutionally vague under the First and Fourteenth Amendments", *Cox* v. *Louisiana*, 379 U. S. at 571. The statute as construed and applied by the enforcing officers "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat", *Cox* v. *Louisiana*, 379 U. S. at 579.

3. The criteria in *Dombrowski* for the exercise of federal equity power where the challenge is to an overbroad statute in the area of free expression have been fully met. This record reveals vividly the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute of sweeping and improper application" *NAACP* v. *Button*, *Dombrowski* v. *Pfister*, *supra*. Such a statute stands condemned under the opinions of this Court from *Edwards* v. *South Carolina* to *Whitehill* v. *Elkins* in this Term of Court. Federal equitable relief against efforts

to enforce an overly broad and selectively enforced state criminal statute touching on the area of the First Amendment is wholly appropriate under the criteria set forth in *Dombrowski.*

4. The Mississippi statute here challenged is being "applied for the purpose of discouraging protected activities". *Dombrowski* v. *Pfister* at 490. Injunctive relief is therefore wholly proper under the second branch of *Dombrowski.*

a) The virtually uncontested evidence reveals that the enforcement of the statute was not related to actual "obstruction" or "interference" but solely involved efforts to penalize constitutionally protected activities. The record shows no evidence of actual obstruction of the streets or entrances. The state had "no expectation of securing valid convictions" 380 U. S. at 490. The convictions would have been void under the rule of *Thompson* v. *Louisville,* 362 U. S. 199 and *Shuttlesworth* v. *Birmingham,* 382 U. S. 87. The record further shows that "the circumstances in this case reflect an exercise of . . . basic constitutional rights in their most pristine and classic form". *Edwards* v. *South Carolina,* 372 U. S. at 235, and that here, the state statute "was deliberately and purposefully applied solely to terminate the reasonable, orderly and limited exercise of the right to protest" Negro discrimination in the right to vote prohibited by the Fifteenth Amendment, cf. *Brown* v. *Louisiana,* 387 U. S. at 147.

b) The failure of the authorities to warn the demonstrators that they were obstructing the entrances to the courthouse further indicates that "obstruction" was not the reason for the arrests, but rather the "discouraging of protected activities". *Dombrowski* v. *Pfister, supra.*

c) The record further shows that the city authorities had in practice sanctioned the type of activity for which appellants were then arrested. The actual area in which appellants marched when the statute was enforced against them had previously been designated by the city authorities as an area in which they were permitted to march. This is "an indefensible sort of entrapment by the State" *Cox* v. *Louisiana*, 374 U. S. at 571. It further reveals that these prosecutions are not pressed with any "real expectation of ultimate success" *Dombrowski* v. *Pfister* at 490. The purpose of the enforcement of the statute was not to cure a non-existent "obstruction" to egress or ingress. It was to discourage the appellants from any picketing at all. Such action is "intolerable under our Constitution". *Brown* v. *Louisiana* at 142.

d) The remand hearing revealed that enforcement of the Mississippi statute has had a "chilling effect upon the exercise of fundamental constitutional rights" requiring the invocation of federal injunctive relief under the criteria of *Dombrowski*. Federal equity relief remains necessary today under the circumstances of this case. The objectives of Congress in passing the Voting Act of 1965 require for their full success the active participation of the Negro citizens of Mississippi in the electoral and registration processes. But as the United States Civil Rights Commission has pointed out "the inhibiting results of mass disenfranchisement are not easily overcome". The free and unfettered utilization of fundamental First Amendment liberties remain critically necessary to the Negro citizens of Mississippi if the objectives of the Congress expressed in the 1965 Act are to be fulfilled. This record, accordingly, brings before the Court a classic situation for the invocation of the criteria for injunctive relief set forth in the second branch of *Dombrowski*.

## POINT I

**28 U. S. C. Section 2283 does not bar a federal injunction in this case.**

### 1. *Section 2283 does not bar relief in this case under the principles of comity embodied in that statute*

The original judgment in this case was vacated and the cause remanded for reconsideration in light of *Dombrowski* v. *Pfister*, 380 U. S. 479. On this remand the district court was directed to "first consider whether 28 U. S. C. Section 2283 bars a federal injunction in this case" 381 U. S. at 741. The response of the majority of the lower court not only failed to grasp the essence of Section 2283, the federal anti-injunction statute, but disregarded entirely this Court's direction to consider the question involved "in light of *Dombrowski* v. *Pfister*".

The majority below viewed 2283, the 1948 revised version of Section 265 of the Judicial Code of 1911[11] as an inflexible limitation upon the power of federal courts to enjoin pending state court criminal proceedings. Applying this analysis the majority below concluded that 42 U. S. C. 1983 under no circumstances creates "an exception to the anti-injunction statute". The lower court offered no rationale for this assumption but chose instead to rest solely upon the decision of the majority of the Fourth Circuit sitting *en banc* in *Baines* v. *City of Danville*, 397 F. 2d 579 (1964). But this conclusion not only misconceives the Fourth Circuit's own analysis of the thrust of the federal

[11] Both statutes relate back to Section 5 of the Judiciary Act of 1793, Ch. 22, 1 Stat. 333, 335. See Revisor's Note, 28 U. S. C. 2283. See also *Toucey* v. *N. Y. Life Insurance Co.*, 314 U. S. 118.

anti-injunction statute. It ignores the direction of this Court that this analysis itself must be reconsidered "in light of *Dombrowski* v. *Pfister*".

What the majority below has failed to grasp is that any analysis of the impact of Section 2283 upon a particular request for the invocation of federal equity power must rest upon the threshold recognition, hitherto unchallenged in this, or any court, that Section 2283 and its statutory predecessor, Section 265, are not jurisdictional statutes. They are codifications and statutory reflections of principles of comity and equity. As this Court said in respect to Section 265 in *Smith* v. *Apple*, 264 U. S. 274, "It is not a jurisdictional statute . . . In short it goes merely to the question of equity in the particular bill".[12] The majority below seeks to avoid "any dissertation on 'jurisdiction' or 'comity'" (App. 46), but these conceptual considerations cannot be so lightly disregarded when they are at the heart of a misconception, which if not rejected, results in undermining the ability of the "independent federal judiciary" to meet its highest obligation as "guardians" of the fundamental rights of the people. Cf. *Chapman* v. *State of California*, —— U. S. ——, 87 S. Ct. 824, 826 (1967, opinion of Mr. Justice Black, for the Court).

The crux of the matter is that *2283*, like its statutory predecessor Section 267, cannot be read as a rigid, "mandatory . . . prohibition". See majority opinion below (App. 46). Rather, as Professor Moore has pointed out "[P]rop-

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[12] See also *Sovereign Camp Woodmen of the World* v. *O'Neill*, 266 U. S. 292, 45 S. Ct. 49, 67 L. Ed. 293; *First Nat. Bank & Trust Co. of Racine* v. *Village of Skokie*, 7 Cir., 173 F. 2d 1; *American Optometrick Ass'n* v. *Ritholz*, 7 Cir., 101 F. 2d 883; *Jamerson* v. *Alliance Ins. Co. of Philadelphia*, 7 Cir., 87 F. 2d 253; *T. Smith and Son* v. *Williams*, 5 Cir., 275 F. 2d 397.

erly considered Section 2283 as a whole does not go to the jurisdiction of a federal court, but is an affirmation of the rules of comity, and hence should be read in conjunction with the judicial principles developed for our dual system of courts". Moore, Commentary on the Judicial Code, Sect. 03 (4a) p. 407.[13]

Thus *Baines* v. *City of Danville,* the very opinion the majority below relies upon to bottom its conclusion that *2283* absolutely bars federal injunctive relief in this case, offers an analysis of the anti-injunction statute which leads inescapably "in light of *Dombrowski* v. *Pfister*" (cf. the mandate of this Court in the first appeal), to the conclusion reached by Circuit Judge Rives that "under the circumstances of this case" 2283 is *no* bar to federal injunctive relief.

For in *Baines,* the Fourth Circuit, recognizing that *2283* "is not a jurisdictional statute" pointed out that "since the statute was fathered by the principles of comity, it has been held that the statute should be read in the light of those principles, and, though absolute in its terms, is inapplicable in extraordinary cases in which an injunction against state court proceedings is the only means of avoiding grave and irreparable injury". 337 F. 2d at 593. However, the Fourth Circuit majority, deciding its case in the summer of 1964, concluded that the "principles of comity" prohibited any federal interference with state court criminal proceedings under the authorization of the equity cause of action created in the Federal civil rights statute, Sec-

[13] See the comment of Circuit Judge Wisdom in *Southern California Petroleum Corp.* v. *Harper,* 273 F. 2d 715, 5 Cir. (1959), "Section 2283 is essentially a rule of comity, and the demand that a federal court interfere with state court proceedings is directed to the discretion of the Court".

tion 1983. This conclusion rested upon the assumption that "in every case before the Supreme Court in which federal interference with state court proceedings has been premised upon asserted denials of civil rights, the Supreme Court has required or sanctioned federal forbearance". 337 F. 2d 579. Thus the Fourth Circuit in August, 1964, reading *2283* "in light of" the principles of comity which underlie the Federal system, acted upon the assumption that these principles require "federal forbearance . . . exemplified by *Douglas* v. *City of Jeannette,* 319 U. S. 157", 337 F. 2d at 593.

But a reading of the *Baines* opinion reveals the essential weakness of the majority below in this case, for their opinion wholly ignores the subsequent holding of this Court in *Dombrowski,* and fails to "reconsider" conclusions in respect to the impact of *2283,* in light of the teachings of that case.

*Dombrowski* teaches that where state court criminal proceedings are utilized for the purpose of deterring or intimidating citizens from exercising fundamental federal rights "the fact of the prosecution, unaffected by the prospects of its success or failure" has a "chilling effect upon the exercise of First Amendment rights" 380 U. S. at 487. The protection of these constitutional freedoms, upon which the very life of a democratic society depends, compels the assertion of federal power to restrain such proceedings. This is true whether the state criminal proceedings draw their authorization from a statute vague or overly broad on its face in the area of the First Amendment, or are instituted under color of otherwise valid state statutes but are "part of a plan to employ arrests, seizures and threats of prosecution under color of statutes to

harass" citizens in the exercise of their constitutional rights. *Dombrowski* v. *Pfister*, 380 U. S. at 482. See also Mr. Justice White, dissenting in *Cameron* v. *Johnson*, 380 U. S. at 755 and Mr. Justice Black, dissenting in *Cameron* v. *Johnson*, 380 U. S. at 749.

Whatever may be the outer reaches of *Dombrowski*[14] its essential teaching is clear. In their concurring opinion in *Mills* v. *Alabama*, 384 U. S. 214 (1966), Mr. Justice Douglas and Mr. Justice Brennan recently had the occasion to restate the heart of *Dombrowski* in words which offer an insight into the central question presented here:

> "That result [the decision of the Court to review the case in Mills] follows *a fortiori* from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal Court will take the extraordinary step of enjoining the state prosecution. *Dombrowski* v. *Pfister*, 380 U. S. 479; *Cameron* v. *Johnson*, 381 U. S. 741", 384 U. S. at 220.

In *Dombrowski* this understanding, that under certain circumstances the "defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights", 380 U. S. at 485, proved the touchstone in resolving the complex questions of federal equity jurisdiction and abstention presented in that case. Underneath the Court's direction that where a state court proceeding "unaffected by

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[14] See generally, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 Rutgers Law Review 92 (1966); Boyer, *Federal Injunctive Relief; A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Rights*, 13 How. L. Jour. 50 (1967).

the prospect of its success or failure", 380 U. S. at 487, itself creates a "chilling effect upon the exercise of First Amendment rights", 380 U. S. at 487, a federal court of equity has a duty and responsibility to act, lies a conception of the fundamental principles of comity governing the Federal Union which helps to resolve the question as to whether *2283* is a bar to injunctive relief in this case.

Shortly after this Court's decision in *Dombrowski,* Circuit Judge Wisdom had the occasion to comment upon the underlying principles of comity which led this Court to reject any concept of "federal forbearance", cf. *Baines v. Danville, supra,* in *Dombrowski.*

In explaining why injunctive relief would have been appropriate in the case then before the Court, *Cox* v. *Louisiana,* 348 F. 2d 750 (5th Cir., 1965), an epilogue to this Court's decision in *Cox* v. *Louisiana,* 379 U. S. 559 (1965), Judge Wisdom used words which illuminate the threshold question presented by this appeal:

> The general principle, basic to American Federalism, that United States courts usually should refrain from interfering with the state courts' enforcing local laws is unassailable. But the sharp edge of the Supremacy Clause cuts across all such generalizations. When a State, under the pretext of preserving law and order uses local laws, valid on their face, to harass and punish citizens for the exercise of their constitutional rights or federally protected statutory rights, the general principle must yield to the exception: the federal system is imperiled.[15]

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[15] Judge Wisdom described the case then before the Fifth Circuit in these terms:

"The second prosecution is without any hope of success. The district attorney's transparent purpose is to harass and punish

Again, in a subsequent case arising out of the Fifth Circuit involving the propriety of Federal injunctive interference with state proceedings, Senior Judge Whitaker, sitting by designation, recently formulated the fundamental principles of federalism which justify such interference under the circumstances presented by this case:

"A court of the United States, quite properly, is loathe to interfere in the internal affairs of a State. The sovereignty of the States, within the boundaries reserved to them by the Constitution, is one of the keystones upon which our government was founded and is of vital importance to its preservation. But in Clause 2 of Article VI of the Constitution of the United States it is provided:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Hence, any State law, which is in conflict with the United States Constitution or a law enacted by Congress in pursuance thereof, cannot be enforced. Nor

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the petitioner for his leadership in the civil rights movement, and to deter him and others from exercising rights of free speech and assembly in Louisiana—in this instance, by advocating integration of public accommodations.

"A civil complaint asserting such an abuse of the prosecutorial function would state a claim under the Civil Rights Act, 42 U. S. C. §1983 and justify injunctive relief. Dombrowski v. Pfister, 1965, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22. This is not a Douglas v. City of Jeannette, Stefanelli, or Cleary v. Bolger situation."

> can a valid State law be applied in a way to thwart the exercise of a right guaranteed by the Constitution and laws enacted by Congress in pursuance thereof.
>
> So, where it is alleged that certain State laws do so conflict or are being utilized, not for legitimate State purposes, but as an expedient to deprive plaintiffs of the rights guaranteed them by the Constitution of the United States and the laws of Congress enacted under the authority thereof, a court of the United States must entertain the suit and, if the allegations are proven, and injunctive relief appears to be required, it must issue the injunction." *NAACP* v. *Thompson*, 357 F. 2d 831 (5th Cir., 1966).

It is of course no coincidence that to a large measure it is out of the decisions of the Fifth Circuit[16] that the understanding has emerged which is at the heart of the restatement of federal responsibility implicit in this Court's decision in *Dombrowski*—that where state court criminal proceedings operate to "chill" the exercise of fundamental federal constitutional freedoms, the very principles of comity which underlie and draw their vitality from the Federal system *require*, rather *restrict*, the exercise of federal power to restrain such proceedings. These rules of comity which govern the relationship of the federal courts to the state courts, the "general principles" Judge Wisdom refers to in *Cox* v. *Louisiana*, must reflect the

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[16] Cf. for example: *Browder* v. *Gale*, 147 F. Supp. 707 (M. D. Ala.), aff'd 352 U. S. 963; *Bush* v. *New Orleans School Board*, 194 F. Supp. 182 (E. D. La., aff'd 367 U. S. 907); *Dombrowski* v. *Pfister*, 327 F. Supp. 556 (dissenting opinion of Circuit Judge Wisdom); *U. S.* v. *Wood*, 295 F. 2d 772 (5th Cir.). See generally, Lusky, Racial Discrimination and the Federal Law: A Problem in Nullification, 63 Columbia L. R. 1163 (1963).

nature of the political system they are designed to operate within. This is a Federal union. It is not a confederation of equal sovereign powers. The doctrines of American federalism which have emerged through struggles and conflict can only be understood in terms of the original repudiation of the political philosophy underlying the Articles of Confederation. Fundamental to the system of government which emerged after 1787 was the recognition that the alliance of independent and separate sovereign states had been replaced by a Federal Union. This new political form represented a bold experiment in government. In order to preserve the values of the independent local self-government entities which the states represented, within the framework of a unified Nation with power to survive and protect the interests of all its citizens, a fundamental allocation of responsibilities had to be made. In this distribution of power the primary responsibility for the protection and preservation of the Union itself and the system of government upon which it rests fell upon the national government.

It is within this context that the relation of Section 2283 to the relief here requested must be examined. The preservation of American federalism, the necessary objective of any rule of comity, requires that this original and fundamental division of responsibility between the national government and the states be respected. The healthy values of a federal system are no more served by a denial of national responsibility than by an intrusion into local responsibility. Upon the national government and the national courts has been placed the primary responsibility for the preservation of those aspects of government essential to the existence of the Federal Union and the protec-

tion of the fundamental liberties of the First Amendment is of this order.

Accordingly, if *2283* is indeed "an affirmation of the rules of comity," Moore, *Commentary, supra,* and "should be read in the light of those principles," *Baines* v. *Danville, supra,* it would seem inescapable that the only conclusion which can be drawn from the meaning of this Court's opinion in *Dombrowski* is that the "principles developed for our dual system of courts", Moore, *Commentary, supra,* do not foreclose, but in fact require federal equity intervention to restrain state court proceedings where relief is otherwise "proper in light of the criteria set forth in *Dombrowski*", *Cameron* v. *Johnson,* 381 U. S. 741. It is in this sense, we would suggest that, in the words of Circuit Judge Rives "the only real issue in this case" is whether "the facts as proved require the granting of the relief requested." In short, *Dombrowski* itself answers the preliminary threshold question posed in the *Cameron* remand. Relief grounded upon a complaint and record which meets "the criteria set forth in *Dombrowski*" 381 U. S. at 741, is not barred by the principles of comity embodied in the federal anti-injunction statute.[17]

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[17] In a recent opinion Circuit Judge Wisdom, concurring with a *per curiam* opinion of a three-judge statutory court, *Ware* v. *Nichols,* 266 F. Supp. 564 [N. D. Miss., 1967, Circuit Judges Coleman and Wisdom and District, now Circuit, Judge Clayton], holding the Mississippi sedition law unconstitutional under the principles of *Dombrowski* v. *Pfister,* has had the occasion to discuss the fundamental issues raised by the threshold question in the *Cameron* remand in this way:

> "This case involves no federal invasion of states' rights protected by Section 2283. Instead, this case requires rightful *federal interposition* under the Supremacy Clause to protect the individual citizen against state invasion of his constitutionally protected national rights as a citizen of the United States."

*(footnote continues on next page)*

**2. *Prior decisions of this Court support the conclusion that an injunction which meets the criteria of* Dombrowski, *brought under Title 42 U. S. C. Section 1983, is an "expressly authorized" exception to Section 2283***

The history of the interpretation by this Court of *2283* and its statutory predecessor, Section 265 of the Judicial Code of 1911 supports the conclusion that injunctive relief grounded on Title 42 U. S. C. 1983 which meets "the cri-

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Judge Wisdom footnoted his conclusion with this interesting summary of the decided case law:

"2. Baines v. City of Danville, 4 Cir. 1964, 337 F. 2d 579, cert. denied, 381 U. S. 939, 85 S. Ct. 1772, 14 L. Ed. 2d 702 (1965) held that Section 1983 is not an exception to Section 2283. In analogous situations, however, decisional authority can be found for injunctive relief or removal. Dilworth v. Riner, 5 Cir. 1965, 343 F. 2d 226 authorized injunctive relief for plaintiffs charged with breach of the peace for a sit-in demonstration in a restaurant, a federally protected right. City of Greenwood v. Peacock, 1966, 384 U. S. 808, 86 S. Ct. 1800, 16 L. Ed. 2d 944, denied removal of certain state court prosecutions but recognized the availability of injunctive relief under some of the allegations made in the *Peacock* removal petitions. Compare State of Georgia v. Rachel, 1966, 384 U. S. 780, 86 S. Ct. 1783, 16 L. Ed. 2d 925, permitting removal of state prosecutions for activities now protected by Title II of the Civil Rights Act of 1964. See also Tolg v. Grimes, 5 Cir. 1966, 355 F. 2d 92, cert. denied 384 U. S. 988, 86 S. Ct. 1887, 16 L. Ed. 2d 1005 (1966); NAACP v. Thompson, 5 Cir. 1966, 357 F. 2d 831, 838; Hillegas v. Sams, 5 Cir. 1965, 349 F. 2d 859, 863, cert. denied 383 U. S. 928, 86 S. Ct. 927, 15 L. Ed. 2d 847 (1966); Cooper v. Hutchinson, 3 Cir. 1950, 184 F. 2d 119; Tribune Review Publishing Co. v. Thomas, W. D. Pa. 1957, 153 F. Supp. 486, 490. And see Moore, Federal Practice par. 0.213.(1) at 2416 (2d 1960); Mintz, The Dombrowski Remedy —Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights, 21 Rutgers L. Rev. 92 (1966); Boyer, Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights, 13 How. L. Jour. 50 (1967); Brown, Dombrowski v. Pfister, 34 Fordham L. Rev. 71 (1965).

Cf. United States v. Wood, 5 Cir. 1961, 295 F. 2d 772 holding that 42 U. S. C. §1971 is an exception to Section 2283."

teria set forth in *Dombrowski*" 381 U. S. at 741, should be held to fall within the "expressly authorized" exception to Section 2283.[18]

**a. The antecedents of section 2283 and the gloss placed upon the statutes by this Court**

The original version of section 2283 was section 5 of the Act of March 2, 1793, 1 Stat. 335, which provided that:

> . . . nor shall a writ of injunction be granted . . . to stay proceedings in any court of a state . . .

In 1874 an exception was engrafted onto this provision, and its language was slightly rephrased, so that it read (36 Stat. 1162, 28 U. S. C. §379, §265 of the Judicial Code of 1911):

> The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

This language remained intact until the revision of 1948.

Notwithstanding the near-absolute language of the act, however, this Court over the years found a variety of "implied exceptions" to the sweep of its prohibition. See,

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[18] Section 2283 provides as follows: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." In *Dombrowski*, this Court found it "unnecessary" to resolve the generalized question as to whether suits under 42 U. S. C. 1983 come under the 'expressly authorized exception to Section 2283' and compared *Cooper* v. *Hutchinson*, 184 F. 2d 119, 124 (3rd Cir. 1950) with *Smith* v. *Village of Lansing*, 241 F. 2d 856, 859 (7th Cir. 1957)." 380 U. S. at p. 484, Footnote 2.

e.g., *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118 (1941); *1A Moore's Federal Practice* ¶0.208[2], [4], pp. 2302, 2324, ¶0.209, p. 2401 *et seq.*; Hart and Wechsler, *The Federal Courts and The Federal System*, 1075-1076 (1953). One category of such "implied" exceptions, prior to the 1948 revision, was the so-called "statutory" exceptions, *i.e.*, exceptions which appeared to be authorized by other federal statutes. See *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, 132-134 (1941). Other exceptions, not grounded upon federal statutes, were also recognized. See *Toucey* v. *New York Life Insurance Co.*, *supra* at 134 *et seq.*[19]

One of the "implied exceptions" to the antecedents of Section 2283 which the Court recognized appeared in the

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[19] Under the antecedents of section 2283 the lower courts were divided over the question of whether section 1983 amounted to an "implied exception" to the anti-injunction act. Compare *Aultman & Taylor Co.* v. *Brumfield*, 102 Fed. 7 (C. C. N. D. Ohio, 1900), *appeal dismissed, with costs, on authority of counsel for appellants*, 22 S. Ct. 938, 46 L. Ed. 1265 (1902), and *Mickey* v. *Kansas City*, 43 F. Supp. 739 (W. D. Mo. 1942), with *Tuchman* v. *Welch*, 42 Fed. 548, 557-559 (C. C. D. Kan. 1890). In the *Tuchman* case, the court, after quoting what is now section 1983, said:

> "Suppose the state of Missouri should enact a law prohibiting any colored citizen from exercising any right of suffrage, and provide for his arrest and criminal prosecution for voting, with the auxiliary proceeding that the proper county attorney might also apply for an injunction, and perpetually enjoin him from exercising his constitutional privilege; that, under such law, he should be arrested and enjoined; and, after he had been discharged from arrest by the writ of *habeas corpus*, the said officers should threaten to proceed against him as for contempt, under such injunction, for renewing the effort. Would it be questioned that the United States court could entertain a bill in equity under the act of 1871 [i.e., section 1983] to restrain such order . . . "

This opinion is criticized in the *Aultman* case, *supra*. But that case took a very strict view of the scope of the anti-injunction statute, a view apparently not in accord with the developing doctrine of "implied exceptions."

Emergency Price Control Act of 1942, 56 Stat. 23. Section 205(a) of this Act (56 Stat. at 33) provided that:

> Whenever in the judgment of the administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision . . . .

In short, the Price Administrator was given general injunctive powers to enforce the Act. In *Porter* v. *Dicken*, 328 U. S. 252 (1946), a state court had issued a writ of possession to evict a tenant, and the Administrator sued in federal court for an injunction to restrain the eviction. The district court first issued a temporary restraining order, but later dismissed the complaint "on the ground that §265 of the Judicial Code, 28 U. S. C. 379, deprived the Federal District Court of jurisdiction to stay the proceedings in the state court." 328 U. S. at 253. This Court held (*id.* at 254-255):

> The District Court erred in holding that the policy of §265 should not be considered impaired by the Emergency Price Control Act . . . §205 of the Price Control Act which authorizes the Price Administrator to seek injunctive relief in appropriate courts, including federal district courts, is an implied legislative amendment to §265, creating an exception to its broad prohibition. *This is true because §205 authorizes the Price Administrator to bring injunction proceedings to enforce that Act* in either state or federal courts, *and this authority is broad enough to justify an in-*

> *junction to restrain state court evictions.* But if §265 controls, as the District Court held, the Administrator here could not proceed in the federal court, since there is a proceeding pending in a state court. Since the provisions of the Price Control Act, enacted long after §265, do not compel the Administrator to go into the State courts but leave him free to seek relief in the federal courts, he was not barred by §265 from seeking an injunction to restrain an unlawful eviction (emphasis added).

*Porter* v. *Dicken,* thus, held that a federal statute creating a federal cause of action for an injunction, although not referring specifically to injunctions against state court proceedings, was sufficiently broad to authorize injunctions against state court proceedings, and was for that reason excepted from the prohibition of the anti-injunction statute. This rationale would, it seems, apply directly to suits for injunctions brought under Section 1983 against pending state court proceedings where the criteria for injunctive relief set forth in *Dombrowski* are present. Section 1983, like Section 205(a) of the Price Control Act, authorizes injunctive relief, without referring in terms of injunctions against state court proceedings. Under the rationale of *Porter* v. *Dicken* it would seem that "this authority is broad enough to justify an injunction to restrain state court" proceedings.

**b. The statutory revision in 1948 does not undermine the rationale of *Porter* v. *Dicken* .**

The statutory revision in 1948 utilizing the words "expressly authorized by Act of Congress" does not undermine the rationale of *Porter*. See *Hart & Wechsler, op. cit.*

at 1076. "Expressly authorized" does not require reference in specific terms to Section 2283. *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, 516 (1955). Nor would it seem to mean that specific words of authorization to restrain state court proceedings must be included in the statutory grant of equitable power. Otherwise almost all of the earlier recognized statutory exceptions would have been repealed by the 1948 codification. But the Revisor's Notes state that the revision was designed to "restate" and reestablish the existing law as to "exceptions" prior to *Toucey*.[20] See *Hart & Wechsler, op. cit.* at 1077. The 1948 codification would seem therefore to reaffirm the reasoning of *Porter* that the equitable grant of power in a statute like the Civil Rights Act falls with the exceptions of *2283*.

This question was considered by this Court in 1955 but not resolved in *Amalgamated Clothing Workers, supra*. The Court did not reach the question as to whether a statute which in general terms authorizes injunctive relief can be a statute "expressly" authorizing injunctions against

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[20] The "substance" of the Reviser's notes are quoted in *Hart & Wechsler, op. cit.* at 1075, as follows:

> An exception as to Acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover all exceptions.
>
> The phrase "in aid of its jurisdiction" was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts.
>
> The exceptions specifically include the words "to protect or effectuate its judgments," for lack of which the Supreme Court held that the Federal Courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See *Toucey* v. *New York Life Insurance Co.*, . . . ).
>
> Therefore the revised section restores the basic law as generally understood and interpreted prior to the Toucey decision. Changes were made in phraseology.

state courts within the meaning of Section 2283. Since the *Amalgamated* decision turned on the fact that the grant of equitable relief in the statute there involved was only to the National Labor Relations Board or its officers and not to the petitioner-union, unlike Section 1983 of the Civil Rights Act which permits "any person" to seek the equitable relief authorized, the Court did not reach the question now squarely posed in this appeal.

The interpretative approach developed over the years in analyzing Section 2283 and its predecessor statute would seem to lend considerable support to the conclusion reached by Circuit Judge Rives in his dissenting opinion below that:

> "The principles rationally extrapolated from the cases creating express exceptions to the prohibition of section 2283 derive content from the concrete situations which gave rise to them. Where a specific, limited and clearly delineated substantive right has been conferred by Congress the courts have found an express exception to section 2283. The express exception is the necessary concomitant of the need to vindicate federally created rights and is entirely consistent with the history of section 2283" (App. 63).

In the deepest sense, therefore, the concept underlying the cases defining the "exception" doctrine reflects again the comity principles governing the dual systems. Where it is necessary to exercise federal power to "vindicate" federal rights, the Courts have found an "exception" to the anti-injunction statute.[21] In this spirit, where, as here,

[21] For example, the federal courts in the Fifth Circuit have previously recognized this exception to §2283 based on a "specific lim-

the "need to vindicate" most "precious" federal rights is involved, cf. *Dombrowski* v. *Pfister, supra* at 486, a holding that injunctive relief based upon 42 U. S. C. 1983 which meets the criteria of *Dombrowski,* is an "express exception" to Section 2283, is in Judge Rives' words, "entirely consistent with the history of section 2283" (App. 63).

### 3. *Injunctive relief against state proceedings which meet the criteria of* Dombrowski *was one of the "statutory purposes sought to be achieved" by the legislative enactors of Section 1983*

A powerful consideration reenforcing the conclusion that *2283* does not bar the injunctive relief here sought flows from an examination of the Reconstruction legislation which grounds the invocation of federal equity power in this case.

In a recent decision holding that an injunction brought pursuant to a provision of the 1964 Civil Rights Act, Section 203(a)-(c), is an exception to the *2283* bar, the Fifth Circuit pointed out that perhaps the soundest guiding principle for determining "express authorization" within the meaning of 2283 is consideration of "the statutory purpose

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ited and clearly delineated substantive right . . . conferred by Congress." In *United States* v. *Wood,* 295 F. 2d 772 (5 Cir. 1961) the government sought injunctive relief pursuant to 42 U. S. C. §1971 against a state criminal proceeding. The Fifth Circuit granted that relief noting that it was appropriate where state court proceedings are used as "instruments for the deprivation of constitutional rights." 295 F. 2d at 781. And in *Dilworth* v. *Riner,* 343 F. 2d 226 (5 Cir. 1965) it was held that §203(a)-(c) of the 1964 Civil Rights Act was also an exception to the *2283* bar.

sought to be achieved" by the congressional enactment. *Dilworth* v. *Riner*, 343 F. 2d 226 (5 Cir. 1965).[22]

Applying this test to the statutory provision for equitable relief here involved, Section 1983 of Title 42 of the United States Code[23] the conclusion is inescapable that the "statutory purpose sought to be achieved" by the congressional enactors involved precisely the type of assertion of national power found in the invocation of federal injunctive power against state court proceedings which harass and intimidate citizens in the exercise of their fundamental rights.

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[22] In arguing that *1983* adequately authorizes a federal court to enjoin a state court proceeding Professor Moore suggests a similar inquiry:

> In a suit to redress private rights, how definite must the statutory authorization be to bring the case within the first exception to §2283? The Civil Rights Act provision for a "suit in equity" to redress the deprivation of rights has been held to authorize a federal court to enjoin state court proceedings [citing *Cooper* and *Tribune*]. On the other hand provision in the anti-trust acts for injunctive relief in a private suit, is not an authorization for the federal court to enjoin a state court from proceeding with a suit over which it has jurisdiction, even though some of the matters to be there adjudged are within the compass of the federal action. *The differentiating factor is the underlying purpose of the statutory provision for equitable or injunctive relief.* (Emphasis added.)

[23] Section 1983 of Title 42 of the United States Code reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 is derived, almost without change, from Section One of the 1871 "Act to Enforce the Fourteenth Amendment".[24] As Mr. Justice Fortas has recently stated for the Court, "The purpose and scope of the 1866 and 1870 enactments must be viewed against the events and passions of the time" *United States* v. *Price,* 383 U. S. 787, 803. Any examination of the legislative debates surrounding the enactment of these measures reveals the accuracy of a recent historical conclusion that "in 1870, measures to preserve the Negro's constitutional rights were desperately needed, and Congress responded with the passage of the Enforcement Acts of 1870 and 1871" Swinney, *Enforcing the Fifteenth Amendment, 1870-1877,* 28 Journal of Southern History 202, 218 (1962). Section 1983 was one of the principal remedies forged in the intensity of congressional determination to assert the supremacy of national power in the protection of the fundamental rights of the race of newly freedmen. *Monroe* v. *Pape,* 365 U. S. 167.[25] The Reconstruction majorities were determined to

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[24] Act of April 20, 1871, ch. 22, §1, 17 Stat. 13.

[25] See, for example, the discussion of the significance of the panoply of Reconstruction remedial legislation by then Circuit Judge, now Mr. Justice Marshall, in his dissenting opinion in *People* v. *Galamison,* 342 F. 2d 255, 275, 283 (2d Cir., 1964):

"The legislators of the Reconstruction Era saw the federal courts as a necessary and perhaps the most appropriate forum for the protection of federal rights. This conception was expressed in, for example, the Act of April 9, 1866, 14 Stat. 27, §3 of which was the first step toward the present §1443; the Act of February 5, 1867, 14 Stat. 385, the habeas corpus statute (now 28 U. S. C. §2241(c)(3)) providing a federal forum to try a state prisoner's claim that he is being deprived of liberty in violation of the Constitution, see *Fay* v. *Noia,* 273 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963); the Act of April 20, 1871, 17 Stat. 13, the antecedent to §§1983 and 1985 giving the federal courts original jurisdiction to remedy, either in a civil

go, as a recent commentator has put it, "to the limits of Constitutional power", Note, 21 Rutgers L. R., *supra*, at 109, to create effective national instrumentalities of power to protect the fundamental constitutional rights guaranteed to the new citizens. The sponsor of the legislation, Representative Shellabarger of Ohio placed the question of the overriding nature of "the federal role in the establishment and vindication of fundamental rights", cf. *United States* v. *Price*, 383 U. S. at 806, 807, in sharp and direct words.

> "[T]o say that Congress can do no such thing as make any law so enforcing these rights, nor open the United States courts to enforce any such laws, but must leave all protection and law-making to the very states which are denying the protection, is plainly and grossly absurd. . . .
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> . . . . .
>
> If, after all this transcendent profusion of enactment in restraint of the States and affirmative conferment of power on Congress, the States shall remain unrestrained, the complete, sole arbiters of power, to defend or deny national citizenship—to make laws abridging or not abridging, to protect or to destroy . . . these United States citizens as the State may please, and the United States must stand by a powerless spectator of the overthrow of the rights and liberties of its citizens, then not only is the profusion of guards put by the Fourteenth Amendment around our rights a miserable waste of words, but the Government is it-

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or criminal action, claimed violations of federal constitutional rights, see *Monroe* v. *Pape*, 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

self a miserable sham, its citizenship a curse, and the Union not fit to be." [26]

The Republican majority which enacted the Shellabarger proposal into law emphasized over and over again their conception that this new weapon of federal enforcement they were creating, the 1983 cause of action for relief, cf. *Dombrowski* v. *Pfister, supra,* at 490, was designed to effectuate federal supremacy over *any* state proceedings which interfered with fundamental rights.[27]

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[26] Cong. Globe, 42d Cong., 1st Sess. App. 68, 69 (1871).

[27] See for example these comments in the debates:

"We Republicans mean to go on until we shall give full force and effect to every provision of the American Constitution. . . .

Sir, a Government that cannot protect the humblest man within its limits, that cannot snatch from oppression the feeblest woman or child, is not a Government. It is wanting in the vital attribute of government. The power to protect its people inheres indestructibly in all Governments, and that frame of constitution or laws which does not provide for it fails to establish government. Id. at 339.

To argue thus [that the United States cannot intervene to protect basic rights] is to violate every sound principle of legal and logical interpretation, and to suppose a great wrong without a remedy in our political system. Id. at 389.

Am I to abandon the attempt to secure to the American citizen these rights, given to him by the Constitution . . . or, sir, am I to resort to the last extreme remedy of the Constitution? . . .

I conclude . . . by saying that in my opinion Congress has power to legislate for the protection of every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution, and that this may be done—

First. By giving him a civil remedy in the United States courts for any damage sustained in that regard. Id. at 477.

If such things can be without a remedy applied if need be by the national arm, then are we little more than a bundle of sticks, but not a nation. Believing that we are a nation, I cannot doubt the power and the duty of the national Government."

But with even greater relevance to the present issue before the Court, the legislative debates reveal an intense concern that this new remedy for asserting federal primacy in the protection of fundamental rights be available to meet the ever present problem of the deprivation of rights accomplished in whole or part through the abuse and perversion of state court machinery in the southern states.[28]

That this was one of the "statutory purposes" of Section 1983 stands out clearly in the exhaustive legislative history of the provision analyzed carefully in both the majority

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[28] See, for example, these comments in the debates:

Cong. Globe, 42d Cong., 1st Sess. App. 78 (1871).

> If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much as denial to that class of citizens of the equal protection of laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor of this class of citizens. Id. at 334.
>
> If the State Legislature pass a law discriminating against any portion of its citizens . . . it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another . . . the State has not accorded to all its citizens the equal protection of the laws. Ibid.
>
> Plausibly and sophistically it is said the laws of North Carolina do not discriminate against them; that the provisions in favor of the rights and liberties are general; that the courts are open to all; that juries, grand and petit are commanded to hear and redress without distinction as to color, race, or political sentiment.
>
> But it is a fact, asserted in the report, that of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of his temples.

and dissenting opinions in *Monroe* v. *Pape*, 365 U. S. 167. In Mr. Justice Douglas' majority opinion for the Court one question emerges time and again in his discussion of the history of the provision. Central among the concerns of the Reconstruction Congress which enacted the statute were the deprivations of rights of citizens which occurred in the course of court proceedings. The misuse of state court proceedings, and in particular criminal proceedings, was at the very heart of the breakdown in constitutional protection which the Ku Klux Klan Act [the statutory predecessor of 1983] was designed to provide federal remedies to meet. Over and over again in setting forth the legislative history of the statute the Court's opinion emphasized that the misuse of the judicial proceedings in the former slave holding states occupied the principal concern of the enactors. See, for example, 365 U. S. 174, n. 10, 178, 179.[29]

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[29] Mr. Justice Douglas in his recent dissenting opinion in *Pierson* v. *Ray*, —— U. S. ——, 87 S. Ct. 1213 (1967) gave additional evidences of the legislative purpose to meet problems posed by misuse of the state judicial machinery. Thus he wrote:

> The congressional purpose seems to me to be clear. A condition of lawlessness existed in certain of the States, under which people were being denied their civil rights. Congress intended to provide a remedy for the wrongs being perpetrated. And its members were not unaware that certain members of the judiciary were implicated in the state of affairs which the statute was intended to rectify. It was often noted that "immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." Cong. Globe, 42d Cong., 1st Session, 374. Mr. Rainey of South Carolina noted that "The Courts are in many instances under the control of those who are wholly inimical to the impartial administration of justice". Id., at 394. Congressman Beatty claimed that it was the duty of Congress to listen to the appeals of those who "by reason of popular sentiment or secret organizations or prejudiced juries or bribed judges (cannot) obtain the rights and privileges due an American citizen. * * *" Id., at 429. The members supporting the proposed measure were apprehensive that there had been a complete breakdown in the

The dissenting opinion of Mr. Justice Frankfurter likewise highlights the congressional concern with violations of constitutional rights committed through the misuse of state judicial proceedings.[30] As Justice Frankfurter points out the earlier Act upon which Section 1 of the 1870 Act was based (the predecessor to 1983) "had as its primary objective the effective nullification of the Black Codes, those statutes of the Southern legislatures which had so burdened and disqualified the Negro so as to make his emancipation illusory." 365 U. S. at 225. The main thrust of the Black Codes was the utilization of a wholly discriminatory system of criminal laws and criminal proceedings designed to restore the freedman to his ante-bellum status.[31] It is understandable therefore that there should have been deep Congressional concern with the misuse of state court proceedings as "instruments for the deprivation of constitutional rights." Cf. *United States* v. *Wood, supra.*[32]

There may be many complicated questions as to the scope and breadth of the concept of "color of law" in the

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administration of justice in certain States and that laws nondiscriminatory on their face were being applied in a discriminatory manner, that the newly won civil rights of the Negro were being ignored, and that the Constitution was being defied. It was against this background that the section was passed, and it is against this background that it should be interpreted.

[30] It should be borne in mind that the difference between the majority and the dissent in *Monroe* had nothing to do with whether "color of law" in the statute included judicial proceedings. Both opinions assume this. The difference lies in the *further* sweep of the "color of law" concept beyond formal organs of law.

[31] See for example 1 Fleming, Documentary History of Reconstruction, 273-311; 2 Commager, Documents of American History, 2.7; Randall, *The Civil War and Reconstruction,* all cited in Justice Frankfurter's opinion in *Monroe* v. *Pape* at 225, Fn. 35.

[32] It seems clear that §1983 was designed to provide a civil remedy for violation of fundamental rights occurring during the course

Reconstruction legislation. Cf. *Williams* v. *United States*, 341 U. S. 97; *Screws* v. *United States, infra*; *United States*

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of state criminal trials. The criminal equivalent of §1983 is now 18 U. S. C. 242. Under this statute prosecutions may be brought for deprivations of civil rights occurring in connection with state trials, like trumped-up proceedings. E.g., *Culp* v. *United States*, 131 F. 2d 93 (C. A. 8, 1942); *Brown* v. *United States*, 204 F. 2d 247 (C. A. 6, 1953); *Screws* v. *United States*, 325 U. S. 91, 126 (1945) (Rutledge, J., concurring). This was clearly intended by Congress. See *Monroe* v. *Pape, supra*. And it is perfectly clear that §1983, enacted in 1871, was intended to reach the same conduct which is punishable under 18 U. S. C. 242.

Thus, Congressman Shellabarger, Chairman of the House Select Committee which drafted the Act of April 20, 1871, now §1983, said that (as described in Flack, *The Adoption of the Fourteenth Amendment*, at p. 228 (1908)):

> [T]he first section of the proposed bill [the Act of 1871] was modeled upon the second section of the Civil Rights Bill of 1866, *the only difference* being that this one provided for civil remedy where the bill of 1866 provided for criminal proceeding. . . . (Emphasis added.)

Similarly, in *Monroe* v. *Pape, supra*, Mr. Justice Frankfurter, dissenting, said (365 U. S. at 212-213, n. 18):

> Mr. Shellabarger, Chairman of the House Select Committee which authored the Act of April 20, 1871, whose first section is now 1979 [of the Revised Statutes, now section 1983 of Title 42] reported to the House that that section was modeled upon the second section of the Act of April 9, 1866, 14 Stat. 27, and that *the two sections were intended to cover the same cases, with qualifications not relevant here*. Cong. Globe, 42d Cong., 1st Sess., App. 68. See also *id.*, at 461. The 1866 provision had been re-enacted, substantially and in form, by the seventeenth and eighteenth sections of the Act of May 31, 1870, 16 Stat. 140, 144 and the 1874 revision of the provision was in turn patterned on the present §1979. See *Screws* v. *United States*, 325 U. S. 91, 99-100. *The sections have consistently been read as coextensive in their reach of acts "under color" of state authority*. (Emphasis added.)

In short, since the criminal provisions dating from the Act of 1866 were clearly designed to reach deprivations of rights occurring in state courts, and since §1983 is the civil equivalent of the criminal provisions, a strong reason exists for thinking that Congress intended the civil remedy to reach as far as injunctions against state court proceedings.

v. *Classic,* 313 U. S. 299; and *United States* v. *Price, supra.* But there is little debate as to whether "color of law" includes "color" of judicial proceedings or judicial officers. Cf. *Ex Parte Virginia,* 100 U. S. 339. Mr. Justice Frankfurter, for example, points out that in outlining his understanding of the statute involved President Johnson in his veto message described the statute in this fashion:

> "It means a deprivation of the right itself, *either by the State judiciary* or the State Legislature." Emphasis added. Cong. Globe, 39th Cong. 1st Sess. 1680, cited in 365 U. S. at 226.

The objections to the legislation were phrased in terms of criticizing the federal law as penalizing "state judges" acting under color of state laws. Cong. Globe 42 Cong. 1st Sess., 365. The evils which the statute are directed against include situations when in a State's "judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another," Cong. Globe, 42 Cong. 1st Sess. App. 315, or where "the courts of the . . . States fail and refuse to do their duty in the punishment of offenders against the law" id. at App. 179, or in which "a class of officers charged under the laws with their administration . . . refuse to extend [their] protection" id. at 334.

The majority opinion of Mr. Justice Douglas and the dissenting opinion of Mr. Justice Frankfurter in *Monroe* are filled with instances of this deep legislative concern. The exhaustive legislative history analysis in both *Monroe* opinions thus proves beyond any possible question that one of the central objectives of the enacting Congress was to provide remedies for the widespread misuse of state

judicial proceedings which resulted "in the deprivation of constitutional rights". Cf. *United States* v. *Wood, supra.*[33]

On the basis of this examination of the "statutory purpose" underlying the enactment of 1983 we would suggest that, as the Court has said recently in an analogous situation in revitalizing the criminal remedies fashioned in the Reconstruction Period, "it would be strange, indeed, were this Court to revert to a construction of the Fourteenth Amendment which would once again narrow its historical purpose—which remains vital and pertinent to today's problems." *United States* v. *Price,* 383 U. S. 787. Section 1983 was designed as a principal remedy in the struggle for federal primacy in the protection of the new national rights of freedom and equality for the race of freedmen.[34] As the United States said in its Brief *Amicus Curiae* submitted in the *Baines* case in the Fourth Circuit in support of Appellants' position:

> "... §1983 was one of the weapons forged in the Reconstruction Era to vindicate the Fourteenth Amendment. It should be construed in light of this broad remedial purpose. And, in this view, the federal courts, it might be thought, ought to be able to consider the equitable

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[33] *Cf.* for example Professor Amsterdam's description of the previous debates of the 39th Congress of 1866:

> It is impossible to read [the debates] ... without concluding that the federal legislators were intensely aware of the hostility and anti-union prejudice of the Southern state courts and of the use of state courts proceedings to harass those whom the Union had an obligation to protect. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights,* 113 U. Pa. L. Rev. 793 (1965).

[34] See generally, Kinoy, *The Constitutional Right of Negro Freedom,* 21 Rutgers Law Review 387 (1967).

merits of a claim under §1983 and to grant the relief sought if it appears warranted under general equitable principles. If §2283 applies, they will apparently be unable to do so." [35]

A decision so interpreting the thrust of Section 1983 in accordance with the original intentions of the enactors would reflect the true sense of the principles of comity embodied in *2283* for as this Court has so recently said in *United States* v. *Price,* "Today, a decision interpreting a federal law in accordance with its historical design, to punish denials by state action of constitutional rights of the person can hardly be regarded as adversely affecting 'the wise adjustment between State responsibility and national control'" 383 U. S. at 806, 807.

In the spirit of this Court's words in *Price,* we suggest that "today" a decision interpreting Section 1983 as authorizing a federal injunction against a state court proceeding which "unaffected by the prospect of its success or failure" has a "chilling effect upon the exercise" of fundamental rights, *Dombrowski* v. *Pfister* at 487, would interpret the statute "in accordance with its historical design", a design which "remains vital and pertinent to today's problems." *United States* v. *Price, supra.*

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[35] The Department of Justice filed a Memorandum for the United States as *Amicus Curiae* in *Chase* v. *Aiken,* #9084, and *Chase* v. *McCain,* #9081, September, 1966, on appeal from the Western District of Virginia District Court to the Court of Appeals for the Fourth Circuit, in which the government discussed the question of whether §1983 was an exception to the §2283 bar. See *Baines* v. *Danville, supra.*

**4. *This Court's recent opinion in* City of Greenwood v. Peacock *indicates that* 2283 *does not bar injunctive relief in this case***

Subsequent to the remand in this case, 381 U. S. 745 (1965), this Court has in effect already spoken to the question as to whether "28 U. S. C. Sect. 2283 bars a federal injunction in this case", 381 U. S. 745, *supra.* In denying the remedy of removal under the civil rights removal statute, 28 U. S. C. 1443, which was sought to be invoked in *City of Greenwood* v. *Peacock,* 384 U. S. 808 (1966), Mr. Justice Stewart wrote for the Court:

> "But there are many other remedies available in the federal court to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. *If the state prosecution or trial on the charge of obstructing a public street or on any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the federal court. See Dombrowski* v. *Pfister,* 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22." 384 U. S. at 829. (Emphasis supplied.)

This opinion, written after the *Cameron* remand, would seem to answer conclusively the threshold question posed in that remand. If a *Dombrowski* injunction is a "remedy available in the federal courts to redress the wrongs claimed" by the petitioners in *Peacock,* 384 U. S. at 829, then clearly *2283* is no bar to a *Dombrowski* injunction against a pending state court "prosecution or trial", 384 U. S. at 829. This must follow since the "wrongs claimed" by the *Peacock* petitioners involved contentions concerning

the pending trials. And in *Peacock,* the federal removal proceedings, for which a *Dombrowski* injunction is suggested by the Court as a possible alternative remedy, were of necessity, commenced *after* the institution of the state prosecutions.

The analysis of the pending state proceedings developed in the dissenting opinion of Mr. Justice Douglas, joined in by the Chief Justice, Mr. Justice Brennan, and Mr. Justice Fortas, emphasizes the inevitable inference that the entire Court, both in the majority and dissenting opinions, joined in suggesting that the "wrongs claimed by" the petitioners involving the state court trials were minimally subject to federal injunctive power, if the criteria of *Dombrowski* were met. Thus the dissenting Justices analyzed the claims set up in the *Peacock* removal petitions in this manner:

> "Continuance of an illegal local prosecution, like the initiation of a new one, can have a chilling effect on a federal guarantee of civil rights. We said in *NAACP* v. *Button,* 371 U. S. 415, 433, respecting some of these federal rights, that '[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.' In a First Amendment context, we said:
>
> 'By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendments rights may derive from the fact of the

> prosecution, unaffected by the prospects of its success or failure.' *Dombrowski* v. *Pfister,* 380 U. S. 479, 487. The latter case was a suit to enjoin a state prosecution. *The present cases are close kin.* For removal, if allowed, is equivalent to a plea in bar granted by a federal court to protect a federal right." At p. 846.

The significant area of difference in analysis between the dissenting opinion and the majority opinion on this question was thus whether the remedy of *removal* was available. There was no disagreement as to whether *Dombrowski* would authorize a federal injunction against the pending state proceedings, if the *criteria* for injunctive relief set forth in that opinion were met. Both Mr. Justice Stewart's opinion for the Court, and Mr. Justice Douglas' opinion for the dissenting four Justices assume the availability of a *Dombrowski* injunction to meet the problems presented by the *Peacock* petitioners' contentions concerning the pending state court proceedings.[36]

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[36] In *Peacock*, the majority of the Court seemed concerned with the practical "result", 384 U. S. at 832, of holding that the removal remedy was available under the circumstances of that case. Apart from the propriety of such considerations, *cf.* the dissenting opinion, 384 U. S. at 853 and *Tennessee* v. *Davis*, 100 U. S. 257, 271, 272, it is of course clear that the *Dombrowski* injunctive remedy, presents none of the "practical" problems which concerned the majority of the Court in *Peacock*. It is an equitable remedy addressed to the sound discretion of the federal court and unlike the removal remedy does not involve a preliminary automatic loss of state court jurisdiction which results from the mere act of complying with the procedural requirement of the removal statute. *Cf.* for example, *Allman* v. *Hanley*, 320 F. 2d 559 (5th Cir., 1962); *Arkansas* v. *Howard*, 218 F. Supp. 626 (D. C. Ark., 1963); *Hopson* v. *North American Insurance Co.*, 71 Idaho 461, 233 P. 2d 799; *State ex rel. Allis Chalmers Manufacturing Co.* v. *Boone Circuit Court*, 227 Ind. 327, 86 N. E. 2d 74; *Brown* v. *Wechsler et al.*, 135 F. Supp. 622 (D. C. 1953); *Lowe* v. *Jacobs*, 243 F. 2d 432 (5th Cir., 1957); *Dienstig* v. *St. Paul Fire and Marine Insurance*

This recognition of the premise implicit in *Peacock* emphasizes the gravity of the situation were the Court now to hold that *2283* bars a *Dombrowski* injunction against a pending state court proceeding. Civil rights removal, the *1983* remedy, and federal habeas corpus were the principal weapons of federal power created by the Reconstruction Congresses to protect the newly granted constitutional rights of the race of freedmen. See generally Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Rights*, 113 U. Pa. L. Rev., 793. By a narrow five to four vote this Court has recently declined to reactivate on any significant level the civil rights removal remedy. *City of Greenwood* v. *Peacock, supra.* If the Court were to now reconsider the premise which underlies the *Peacock* majority opinion and hold that the *1983* injunctive remedy is equally unavailable to protect citizens who face the precise problems for which the Reconstruction legislation was designed, cf. *United States* v. *Price, supra,* to a large measure "the federal role in the establishment and vindication of fundamental rights", *United States* v. *Price,* at p. 806, will be abandoned. This would be a fateful decision for the Court and for the country.

In *Price* the Court took the occasion to remind the nation that this federal role is "today . . . pervasive" and "intense", 383 U. S. at 806. It may be helpful to consider the significance of this "federal role", which the Reconstruction legislation was designed to implement, within the context of "today's problems", *United States* v. *Price,* at 806. A system of law must provide remedies to vindicate

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*Co.*, 164 F. Supp. 603 (S. D. N. Y., 1957); *Shenandoah Chamber of Progress* v. *Frank Associates, Inc.*, 95 F. Supp. 719 (E. D. Pa., 1950); see generally, 25 A. L. R. 2d 1045.

rights or its fundamental premises fail, *Marbury* v. *Madison*, 1 Crouch 137 (1803). Where, increasingly states not yet committed to the full implications of the national promises of freedom and equality to the Negro embodied in the Wartime Amendments, have turned from overt forms of resistance—nullification, interposition, massive resistance, to the more sophisticated reliance upon the utilization of state criminal machinery to harass and intimidate citizens, black and white, who seek to implement the constitutional right of freedom, see for example the illuminating opinion of Circuit Judge Wisdom in *Cox* v. *Louisiana, supra*, the primacy of the "federal role" remains crucial and legal remedies must be available for the vindication of these rights.[37] A decision "today . . . interpreting" Section *1983* "in accordance with its historical design", cf. *United States* v. *Price, supra*, and reaffirming the promise implicit in *Peacock* that at a minimum a *Dombrowski* injunction invoking the authority created in the 1871 statute remains available as a remedy against state prosecutions which interfere with fundamental rights, see *City of Greenwood* v. *Peacock*, 384 U. S. at 829, would reinforce the role

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[37] See Boyer, *Federal Injunctive Relief, a Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Rights, supra*, at p. 58:

> "The increasing use of state criminal statutes and proceedings as a device to harass and deter the exercise of fundamental constitutional rights in efforts to obtain equality for Negro citizens requires a vigorous affirmation of the existence of federal equity to protect fundamental federally created rights. Federal courts in the South would have to close their eyes to existing realities not to notice that many of the cases in the state courts are the direct consequence of racial conflict."

See also United States Commission on Civil Rights, Law Enforcement, a Report on Equal Protection in the South (1965); and Lusky, *Racial Discrimination and the Federal Law; a Problem in Nullification*, 63 Columbia L. R. 1163 (1963).

of "the independent federal judiciary" as "guardians" of the basic liberties of the people. *Chapman* v. *State of California, supra,* at p. 826.

On the other hand, the emasculation and virtual elimination of the *1983* injunctive remedy where the criteria of *Dombrowski* are met would not only fly in the face of this Court's promise in *Peacock*. It would say to the nation, and in particular to the descendants of the race of freedmen, that once again the solemn commitments of primary national responsibility for the fulfillment of the now one hundred year old promises of the Wartime Amendments are in danger of being eroded and eventually abandoned. Neither the "historical design" of the postwar legislation nor its critical importance in light of "today's problems", *United States* v. *Price, supra,* should permit such a conclusion.[38]

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[38] See for example Boyer, *supra* at p. 60:

"If the federal courts fail to act under such circumstances, this would, in effect, eliminate any effective judicial forum for the *prompt* and decisive protection of these rights. With the ever-increasing demand of Negro citizens for equality and freedom from legal tyranny, the elimination of an effective forum would create a constitutional crisis of grave dimensions. The absence of any tribunal of original jurisdiction prepared to enforce constitutional rights would threaten the fundamental assumption underlying the national commitment to a theory of government which encourages and permits social progress and change to take place within the channels of peaceful democratic expression."

## POINT II

**Equitable relief is proper in light of the criteria set forth in *Dombrowski* v. *Pfister*.**

### 1. *The* Dombrowski *criteria*

In *Dombrowski* this Court took jurisdiction "to settle important questions concerning federal injunctions against state criminal prosecutions threatening constitutionally protected expression". 380 U. S. 479, 483. In reversing the dismissal of the complaint by a three-judge statutory court in the Eastern District of Louisiana, Circuit Judge Wisdom dissenting, 227 F. Supp. 556, 564, and in directing the issuance of federal injunctive relief against the enforcement of certain provisions of a Louisiana state criminal statute, this Court established criteria which now govern the appropriateness of the exercise of federal equity power where state criminal statutes and proceedings intrude upon the area of constitutionally protected expression.

Mr. Justice Brennan's opinion for the Court carefully analyzes two related questions involved in determining the propriety of federal relief: One, the allegations necessary to invoke federal *equity* jurisdiction, and two, the relevance of the doctrine of abstention from decision prior to adjudication by the highest state courts. In isolating the "criteria set forth" in *Dombrowski* it will be helpful to discuss these two questions, as the Court does, separately.

*Dombrowski* sets forth two separate and distinct categories of circumstances in which the exercise of federal equity power to restrain state criminal proceedings is appropriate. The first branch of the *Dombrowski* analysis relates to situations in which state statutes are challenged

on their face "as overly broad and vague regulations of expression." 380 U. S. at 490. Where prosecutions under such a statute are actually threatened, this challenge "if not clearly frivolous", the Court holds, "will establish the threat of irreparable injury required by the traditional doctrines of equity". 380 U. S. at 490. This is because of the " 'danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application' *NAACP* v. *Button*, at p. 433", 380 U. S. at 487. Such a statute with an overbroad sweep in this sensitive area has a "chilling effect upon the exercise of First Amendment rights", a "chilling effect", which as Mr. Justice Brennan pointed out for the Court "may derive from the fact of prosecution, unaffected by the prospects of its success or failure". Under the first branch of the *Dombrowski* analysis the criteria controlling the exercise of federal equity power are thus two-fold: (1) a facial challenge, "not clearly frivolous" to the overbreadth or vagueness of a state criminal statute in the area of free expression,[39] and (2) "actually threatened"

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[39] The applicability of the *Dombrowski* concept to a statute overly broad in the area of the First Amendment, was only recently reaffirmed by this Court in *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). See the discussion of Mr. Justice Brennan for the Court at p. 687:

> Thus §105(1)(c) and §3022(2) suffer from impermissible "overbreadth." Elfbrandt v. Russell, supra, 384 U. S. at 19, 86 S. Ct., at 1242; Aptheker v. Secretary of State, supra; N. A. A. C. P. v. Button, supra; Saia v. People of State of New York, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574; Schneider v. State of New Jersey, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; cf. Hague v. C. I. O., 307 U. S. 496, 515-516, 59 S. Ct. 954, 963-964, 83 L. Ed. 1423; see generally Dombrowski v. Pfister, 380 U. S. 479, 486, 85 S. Ct. 1116, 1120, 14 L. Ed. 2d 22. They seek to bar employment both for association which legitimately may be sanctioned and for association which may

prosecutions under the statute. As the Court clearly stated in *Dombrowski,* "appellants have challenged the statutes as overly broad and vague regulations of expression. We have already seen that where, as here, prosecutions are actually threatened, this challenge, if not clearly frivolous, will establish the threat of irreparable injury required by traditional doctrines of equity."[40]

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not be sanctioned consistently with First Amendment rights. Where statutes have an overbroad sweep, just as where they are vague, "the hazard of loss or substantial impairment of those precious rights may be critical," Dombrowski v. Pfister, supra, at 486, 85 S. Ct., at 1120, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe.

[40] That this is all that is required to be shown to justify equitable relief where the challenge is to the *face* of the statute on the grounds of overbreadth is evident in light of the actual results in *Dombrowski.* The district court had refused to permit the taking of any evidence whatsoever in the original hearings and dismissed the complaint for failure to state a cause of action. Despite the absence of any factual record on the allegations of the complaint, this Court ordered the issuance of permanent injunctive relief without further hearings below restraining the enforcement of those provisions of the state statute which it found as a matter of law were void on their face as overbroad and vague in the area of free expression, and under which the state had concededly initiated prosecutions. Thus, it is clear that as to this branch of *Dombrowski,* where the attack is to facial constitutionality the only two criteria required to be met to justify permanent equitable relief are (1) overbreadth and vagueness in the area of the First Amendment, and (2) actual threatened prosecutions.

There is some confusion in the lower courts as to the impact of this *first* branch of the *Dombrowski* doctrine on the question of abstention. Cf. *Zwickler* v. *Koota,* 261 F. Supp. 985 (E. D. N. Y., 1966), probable jurisdiction noted, 87 S. Ct. 854, #29 October Term 1967. We would suggest that this confusion arises from a failure to analyze the fundamental premises of this Court's opinion in *Dombrowski.* The irreparable injury sufficient to invoke federal equitable power when a statute is attacked as overly broad or vague on its face in the First Amendment area flows basically from the *existence* of the statute. "So long as the statute remains available to the state the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of

The second category of circumstances in which federal equitable relief is appropriate under *Dombrowski* is where the state criminal statutes sought to be enforced may be otherwise valid but are being "applied for the purpose of discouraging protected activities". 380 U. S. at 490. This second branch of the *Dombrowski* analysis comes into play where the gravamen of the complaint is that the state "has invoked and threatens to continue to invoke criminal process without any hope of ultimate success, but only to discourage appellants' civil rights activities", 380 U. S. at 490.[41] Where these threats to enforce state criminal statutes are "not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests . . . and threats of prosecution under color of the statutes to harass . . . and discourage" persons from "asserting and attempting to vindicate . . . constitutional rights", such threatened prosecutions have a "chilling effect upon the exercise of First Amendment rights" and justify the intervention of a federal court of equity. *Dombrowski* v. *Pfister, supra* at 482, 490.[42]

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such prosecutions by no means dispels their chilling effect on protected expression." 380 U. S. at 494. Thus a challenge to statutes as "overly broad and vague regulations of expression . . . if not clearly frivolous . . ." where "prosecutions are actually threatened . . . will establish the threat of irreparable injury required by the traditional doctrines of equity" 380 U. S. at 490. And as the Court then says "*the same reasons* [emphasis added] preclude denial of equitable relief pending an acceptable narrowing construction . . ." 380 U. S. at 490.

[41] Such allegations the Court holds state a claim under the Civil Rights Act, 42 U. S. C. 1983, 380 U. S. at 490.

[42] The various opinions in *Cameron* also emphasize this separate second category of criteria for injunctive relief established in *Dombrowski*. Thus, in his dissenting opinion, in which Mr. Justice Stewart and Mr. Justice Harlan joined, Mr. Justice Black commented after discussing the *facial* grounds for invoking *Dombrowski*, "*Dombrowski* also indicates to me that there might be cases in

The criteria for invoking federal equity power under the second branch of *Dombrowski* thus involves a showing that the state is using criminal statutes, possibly otherwise valid, without real expectation of ultimate success and that these prosecutions are for the purpose of discouraging protected constitutional activities.[43]

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which state or federal officers, acting under color of a law which is valid, could be enjoined from engaging in unlawful conduct which deprives persons of their federally guaranteed statutory or constitutional rights. Compare 17 Stat. 13, 42 U. S. C. §1983 (1958 ed.)." Similarly Mr. Justice White in his dissenting opinion in *Cameron* commented upon this second branch of the *Dombrowski* analysis: "Where threats of enforcement are without any expectation of conviction and are 'part of a plan to employ arrests, seizures, and threats of prosecution under color of statutes to harass,' it is obvious that defense in a state criminal prosecution will not suffice to avoid irreparable injury. The very prosecution is said to be a part of the unconstitutional scheme and the scheme, including future use of the statutes, are quite irrelevant to the prosecution in the state courts." See also *Mills* v. *Alabama*, 384 U. S. 214 (1966) (concurring opinion of Mr. Justice Douglas and Mr. Justice Brennan); and *City of Greenwood* v. *Peacock*, 384 U. S. at 829, Opinion of Mr. Justice Stewart for the Court: "If the state prosecution on trial *on the charge of obstructing a public street or on any other charge* would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the federal court. See *Dombrowski* v. *Pfister*, 380 U. S. 479" (emphasis added).

[43] A fully developed discussion of this second branch of the *Dombrowski* analysis is contained in the decision of the Fifth Circuit in *Cox* v. *Louisiana, supra.* In this case Judge Wisdom analyzed the state criminal proceeding there involved as follows:

> "The second prosecution is without any hope of success. The district attorney's transparent purpose is to harass and punish the petitioner for his leadership in the civil rights movement, and to deter him and others from exercising rights of free speech and assembly in Louisiana—in this instance, by advocating integration of public accommodations".

On these allegations Judge Wisdom concluded:

> "A civil complaint asserting such an abuse of the prosecutorial function would state a claim under the Civil Rights Act, 42 U. S. C. 1983, and justify injunctive relief, *Dombrowski* v. *Pfister*, 1965, 380 U. S. 479."

Having delineated the criteria to be utilized in considering the propriety of federal equitable relief in both of these two categories the Court went on to dispose of the abstention doctrine as "inappropriate" in either of the two branches of the *Dombrowski* analysis. Where state criminal statutes are challenged as "overly broad and vague regulations of expression", abstention as a rule of federal adjudication plays no role. As Mr. Justice Brennan pointed out, in such cases "abstention is at war with the purposes of the vagueness doctrine." 380 U. S. at 492. And similarly where state criminal statutes even if otherwise valid are applied "for the purpose of discouraging protected activities" abstention is equally "inappropriate." 380 U. S. at 490. For as the Justice again explained, "the interpretation ultimately put on the statutes by the state courts is irrelevant." 380 U. S. at 490. The central principle which emerges from *Dombrowski* is clear: Where the criteria for the invoking of federal equitable power are met a federal court has the duty to adjudicate the questions involved and issue the injunction prayed for. It may not abstain from this responsibility under the Constitution. As Circuit Judge Wisdom commented in *Cox* v. *Louisiana, supra,* in such cases "there is no federal invasion of states' rights. Instead, there is rightful federal interposition under the Supremacy Clause of the Constitution to protect the individual citizen against state invasion of federal rights."

**2. *The evidence adduced before the lower court at the hearing on remand indicates that injunctive relief is proper in light of the criteria set forth in* Dombrowski**

We turn now to the central issue in this appeal—the question placed by this Court to the district court in the original remand—whether relief is proper in light of the criteria set forth in *Dombrowski,* 381 U. S. 741, 742. This question now comes before the Court for the first time based upon a full evidentiary record (App. 105 to 284). This Court is now able to evaluate within the context of the full record "the setting in which the statute operates," *NAACP* v. *Button,* 371 U. S. 415 and can examine its constitutionality "in terms of its 'immediate objectives', its 'ultimate impact' and its 'historical context and conditions existing prior to its enactment' " *Reitman* v. *Mulkey,* 385 U. S. 967, (Opinion of Mr. Justice White for the Court):

An examination of the record evidence now before the Court for the first time will reveal, we suggest, once again "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application" *NAACP* v. *Button, supra* at 433. *Dombrowski* v. *Pfister, supra* at 487. Furthermore, the record now before the Court will reveal an "invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment" which results in "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments" *Cox* v. *Louisiana,* 379 U. S. 559, 580, 581 (concurring and dissenting opinion of Mr. Justice Black). Under the criteria set forth in both branches of *Dombrowski* injunctive relief is proper and necessary.

**a. The uncontested evidence at the hearing reveals that the statute here challenged has been selectively enforced rendering it violative of the First and Fourteenth Amendments**

In *NAACP* v. *Button,* 371 U. S. 415, this Court warned against a statute which "lends itself to selective enforcement against unpopular causes". In *Button,* this was only a prophecy and yet the statute there involved fell. In *Cox* v. *Louisiana,* 379 U. S. 536, the prophecy became a reality when the Court refused to enforce a Louisiana "obstructing public passages" statute, in face of record concessions before the Court that the Louisiana statute had been "selectively enforced."

Since *Cox* the Court both in majority and dissenting opinions has consistently condemned "the vice of discriminatory enforcement" *Brown* v. *Louisiana,* 383 U. S. 131, 151 (dissenting opinion of Mr. Justice Black, joined in by Mr. Justice Clark and Mr. Justice Stewart). See also *Brown* v. *Louisiana, supra* (opinion for Court by Mr. Justice Fortas at p. 143, concurring opinion of Mr. Justice Brennan at p. 143); and cf.: *Adderly* v. *Florida,* 385 U. S. 39, at p. 47. The open admissions of the Mississippi state authorities at the remand hearing that the statute here under attack has similarly been selectively enforced become dispositive of the constitutional questions in light of these recent expressions by the Court.

In *Cox,* the Court was concerned with the impact of three Louisiana statutes. One of these was the state "obstructing public passages" statute, a provision very similar to the Mississippi statute here under examination. The Louisiana statute provided as follows in its relevant sections:

*"Obstructing Public Passages*

"No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, watercraft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein."

The appellant in *Cox* challenged his conviction under this statute as an "unconstitutional infringement upon freedom of speech and assembly" 379 U. S. at 554. The facts in the record showed a clear "obstruction" of a public sidewalk by a civil rights march across the street from the city courthouse, 379 U. S. at 553. Mr. Justice Goldberg, in the opinion for the Court did not find it necessary to reach the troublesome and yet unresolved question of the "constitutionality of the uniform, consistent, and nondiscriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings." 379 U. S. at 555.[44] For in *Cox,* the record before the Court revealed a practice of "selective enforcement" of the statute rendering it violative of the First and Fourteenth Amendments. 379 U. S. at 558. And as Mr. Justice Goldberg pointed out for the Court "although the statute here involved on its face precludes all street assemblies and parades, it has not been so applied and enforced by the Baton Rouge authorities" 379 U. S. at 556.

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[44] The Court left this question completely open in *Cox*. See Footnote 13, 379 U. S. at 555. Cf. *Kovacs* v. *Cooper,* 336 U. S. 77, 98 (opinion of Mr. Justice Jackson) with *Hague* v. *CIO,* 307 U. S. 496, 515 (opinion of Mr. Justice Roberts).

The "selective enforcement" which rendered the statute violative of the First and Fourteenth Amendments was evidenced in the *Cox* record below by "city officials who testified for the State . . . that certain meetings and parades are permitted in Baton Rouge, even though they have the effect of obstructing traffic, provided prior approval is obtained". This record testimony was "confirmed in oral argument before this Court by counsel for the State" 379 U. S. at 556. The statement of counsel for Louisiana, which became central to the opinion of the Court, was "that parades and meetings are permitted, based on 'arrangement . . . made with officials'" 379 U. S. at 556. Furthermore, as Justice Goldberg pointed out, "the statute itself provides no standards for the determination of local officials as to which assemblies to permit or which to prohibit" 379 U. S. at 556. Justice Goldberg summed up this record evidence in this fashion: "From all the evidence before us it appears that the authorities in Baton Rouge permit or prohibit parades or street meetings in their completely uncontrolled discretion" 379 U. S. at 557.

Based upon this concession and the record evidence of selective enforcement of the statute, the Court held that the use of the statute was "an unwarranted abridgement of appellant's freedom of speech and assembly secured to him by the First Amendment, as applied to the States by the Fourteenth Amendment" 379 U. S. at 558. This conclusion rested upon the analysis of the Court that "the situation is thus the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the unbridled discretion of local officials". Justice Goldberg went on to point out that "the pervasive restraint on freedom of discussion by the practice of the

authorities is not any less effective than a statute expressly permitting such selective enforcement" 379 U. S. at 557. Accordingly, the Court held that under the authority of "a long line of cases in this Court,[45] it is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute" 379 U. S. at 558. This holding commanded a large majority of the Court, the Chief Justice, Mr. Justice Brennan, Mr. Justice Douglas, and Mr. Justice Stewart joined in the majority opinion of Mr. Justice Goldberg. Mr. Justice Black and Mr. Justice Clark concurred in separate opinions strongly condemning the selective enforcement of the statute.[46]

The record evidence and concessions of "selective enforcement" of the Mississippi statute developed at the remand hearing is even stronger than the record evidence of "selective enforcement" of the Louisiana statute in *Cox* v. *Louisiana.*

As in *Cox,* officials here in *Cameron,* have "testified for that state" that "certain meetings and parades are per-

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[45] *Schneider* v. *State,* 308 U. S. 147; *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *CIO, supra; Largent* v. *Texas,* 318 U. S. 418; *Saia* v. *New York,* 334 U. S. 558; *Niemotko* v. *Maryland,* 340 U. S. 268; *Kunz* v. *New York,* 340 U. S. 290.

[46] Mr. Justice Black found that this evidence of selective enforcement rendered the Louisiana statute "unconstitutional under the First and Fourteenth Amendments," as well as "an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment" 379 U. S. at 581. Mr. Justice Clark would have limited the holding to the "equal protection ground." 379 U. S. at 591.

mitted in" Hattiesburg, "even though they have the effect of obstructing traffic, provided prior approval is obtained". Cf. 379 U. S. at 556. And precisely as in *Cox,* this was confirmed by counsel for the state, both in examination and oral argument.

The testimony is uncontradicted, and indeed it is conceded by the state, that a number of parades and marches which have "obstructed" public streets and have "obstructed" traffic, have in fact been permitted to take place in Hattiesburg subsequent to the enactment of the Mississippi statute, and its immediate enforcement against Negro voter registration activities (App. 194, 195, 196, 197, 235, 236, 237, 264, 264-5, 265-6, 266, 266-7). These parades and marches held by civic groups and schools (App. 235-6, 236), such as homecoming demonstrations for Mississippi Southern (App. 236, 264), as in *Cox,* admittedly obstructed traffic in the public streets and blocked off access to public buildings (App. 195, 235-6, 236, 264-5). Both Mr. Wells, as counsel for the state, and Mr. Dukes, the County Prosecuting Attorney for Forrest County, conceded on the record that these parades, permitted by the city, blocked public streets. See, for example, examination of Mr. Dukes (App. 264-5, 266).

The State did not suggest at the hearing below that these parades and marches did not "obstruct" the streets or "block" traffic. Their position in open court was precisely the same as that taken by the Louisiana authorities in *Cox.* Their argument was that these parades were permitted upon arrangements made with the city officials. Cf. 379 U. S. at 556. Thus, Mr. Wells, counsel for the State in this proceeding, addressed the following question to Reverend Cameron, a witness for the appellants, who had just testi-

fied that several school parades had been recently held in Hattiesburg which blocked off the streets and obstructed traffic (App. 194-5):

> "Mr. Wells: Reverend Cameron, these parades you are talking about are parades where people had made arrangements with the City to participate and have just what's a normal parade like you have a parade for the fair and Christmas and things like that, wasn't it?" (App. 195).

On cross-examination by counsel for the appellants, Mr. Dukes, the County Prosecuting Attorney, made the following direct admissions:

> "Q. Now, Mr. Dukes, have there been any parades in Forrest County particularly in Hattiesburg since the arrests of May 18th? A. Yes, sir, parades, schools (sic) which included white and colored bands, school children, cheer leaders, floats and so forth.
>
> "Q. Do these parades ever block the streets? A. Well, I am sure they did but I didn't ever hear anybody complain about it though.
>
> "Q. Did you ever advise Bud Gray [the Sheriff] that they were in violation of this statute? A. No, sir, because I was informed they had permission of the City, the mayor and commissioners.
>
> "Q. Now does this statute contain anything about getting a permit to hold a parade? A. No sir, sure doesn't" (App. 264, 264-5).

Based upon this testimony by the County Attorney and the record concessions by counsel for Mississippi, the conclusion is inescapable that as in *Cox,* the selective enforce-

ment of the Mississippi statute renders it violative of the Constitution. Here, as in *Cox,* it is undisputed that "certain meetings and parades are permitted . . . even though they have the effect of obstructing traffic, provided prior approval is obtained" 379 U. S. at 556. Here, as in *Cox,* these parades are permitted based on "arrangements . . . made with officials". And here, as in *Cox,* "the statute itself provides no standards for the determination of local officials as to which assemblies to permit or which to prohibit". 379 U. S. at 556.

What is most striking about the testimony and concessions here is that it underscores vividly the reasoning and conclusions enunciated by this Court in *Cox* in explaining the constitutional evil in the selective enforcement of a statute which touches the areas of free expression. The vice in the selective enforcement of a broad prohibitory statute, this Court pointed out in *Cox,* is equivalent to the "lodging of such broad discretion in a public official" which "allows him to determine which expression of views will be permitted and which will not." This "sanctions a device for the suppression of the communication of ideas and permits the official to act as censor". 379 U. S. at 557. For, as the Court pointed out, "the pervasive restraint on freedom of discussion by the practice of the authorities under the statute is not any less effective than a statute expressly permitting such selective enforcement". 379 U. S. at 557.

But this discretion which the statute appears to vest in the state officials to decide *which* parades obstructing streets should be banned and which approved, is *precisely* the justification offered by the appellees here for their selective enforcement of the statute against civil rights dem-

onstrators. Both Mr. Wells and Mr. Dukes sought to explain the selective enforcement in terms of the "type" of parade permitted and the "type" suppressed. Thus, in the questioning of Reverend Cameron, Mr. Wells suggests the following:

> "Q. Well, they [the parades permitted] weren't demonstrations and picketing *type* parade, it was just a parade like most cities and towns have from time to time, wasn't it?" (App. 195). (Emphasis added.)

Again, in the same cross-examination, Mr. Wells suggests:

> "Q. You don't class that kind of parade in the same category as picketing around a court house, do you?
>
> [Objection was overruled.]
>
> Q. You don't put that in the same class with the *type* of picketing you all were doing, do you? (Emphasis added.) A. Well, it was not for the same purpose.
>
> Q. That's right" (App. 196).

Nothing could be clearer than that the Mississippi authorities have utilized this "extremely broad prohibitory statute", cf. *Cox,* 379 U. S. at 558, to distinguish between conduct prohibited by the statute and conduct sanctioned by it on the grounds of the *"purpose"* of the activity. If it is the "type" of parade which is "normal" (App. 195), which everyone "likes" (App. 195), which no one "complains" about (App. 264), if in short, the city agrees with the "purpose" of the parade (App. 195), it does not matter if it obstructs the public streets. It will be permitted. If, on the other hand, it is a different "type" of parade or

demonstration (App. 195), if it has a different "purpose" (App. 195), it will be banned. But this is precisely what the Constitution prohibits. The Mississippi authorities in this proceeding have candidly conceded that in enforcing the statute they wield "a broad discretion" in determining "which expression of views will be permitted and which will not. Cf. *Cox,* 379 U. S. at 536. If the parade which obstructs the streets has a purpose which meets with general community approval, the statute is not enforced. If the parade has a different purpose, perhaps in sharp opposition to the "politically dominant white community," cf. *NAACP* v. *Button,* 371 U. S. 415, then, as in the present situation, the statute will be enforced against the marchers. This the Constitution will not tolerate. *Cox* v. *Louisiana, supra; Brown* v. *Louisiana, supra* (majority and dissenting opinions); *Adderly* v. *Florida, supra.*

Mississippi additionally seeks to justify this admitted selective enforcement of the statute by pointing out that the Mississippi law, unlike the Louisiana law, makes criminal only "picketing" and "mass demonstrations" which obstruct public streets. The parades which obstructed streets but were permitted were not "mass demonstrations", so the argument goes. But this effort to avoid the impact of *Cox* merely serves to underscore the total constitutional invalidity of the statute. It is the very breadth and imprecision of the term "mass demonstration" which permits the state to assume that a "demonstration" which expresses majority sentiments of public opinion, such as a welcome to a football team is not a "mass demonstration", but is a parade. However, a much smaller gathering which expresses minority sentiments perhaps hostile to the majority climate is a "mass demonstration". But the dictionary definition of a "demonstration" is a "public exhibition of

welcome, approval, or condemnation, as by a mass meeting or procession". *Funk & Wagnall's New College Standard Dictionary.* Another definition of "demonstration" is found in the *Shorter Oxford English Dictionary,* 3rd Edition: "a public manifestation of feeling; often taking the form of procession and mass meeting". Clearly, the dictionary definition of "demonstration" broadly sweeps into its orbit all public "manifestations of feeling" or "exhibitions of welcome, approval or condemnation", which take the form of mass meetings or processions. Mississippi, however, seeks to use this imprecise and broadly contoured characterization to pick and choose these "manifestations of feeling" it desires to permit and those it desires to prohibit. If the "public manifestation of feeling" reflects the views of the dominant majority, if it expresses safe and comfortable views like expressions of welcome to a football team, or manifestations of school spirit and pride, then it is not a "demonstration" but a "parade". If, on the other hand, the "public manifestation of feeling" reflects unpopular views such as opposition to the community favored policy of Negro disenfranchisement, then it becomes a "demonstration" prohibited by the statute. The very structure of the statute enables the Mississippi authorities "to determine which expression of view will be permitted and which will not". *Cox* v. *Louisiana, supra.* It is constructed deliberately through the use of the terms "mass demonstration" to permit "invidious discrimination among persons or groups", and it has been so enforced. Under the commanding authority of *Cox* v. *Louisiana,* "it is clearly unconstitutional". 379 U. S. at 557. See also *Brown* v. *Louisiana,* and *Adderly* v. *Florida,* both *supra.*

The record evidence which led Circuit Judge Rives to conclude that "this is a case of selective enforcement" and

that "If there is anything 'consistent' or if any 'uniformity' appears in this record, it is that Section 2318.5 was consistently used to harass the civil rights movement in Hattiesburg" (App. 81), is further reinforced by the uncontested testimony as to the actual events on the morning of April 10th, when the statutes were first applied against the civil rights demonstrators. At the very moment the police were arresting the demonstrators who were patrolling the area formerly cordoned off for that purpose by the sheriff, a crowd of white people had gathered on the sidewalks and courthouse steps to watch the arrests (App. 122, 123, 144, 161-2). None of those who crowded about the scene obstructing the courthouse entrances were arrested.

The following is a description of the scene given by appellants' witness Reverend John Mehl on cross examination by Mr. Wells:

> Q. You were asked by counsel about some groups that were there and asked whether or not they were arrested. Now I believe you pointed out that some of these groups were over here by Sears? A. Yes, sir.
>
> Q. That's across the street from the courthouse? A. Yes, sir.
>
> * * * * *
>
> Q. And then there were some people on the steps [of the courthouse itself]? A. Yes, sir.
>
> Q. Were they demonstrating or picketing in any way or just standing there? A. They were just spectators.
>
> * * * * *
>
> Q. How many? A. Well, there was a tight knot of people, a tight knot of people . . .
>
> * * * * *

Q. Anyone obstructing any part of an entrance or anything? A. They were obstructing the main entrance to the courthouse.

Q. This big entrance to the courthouse here? A. Yes, sir.

Q. How many would you say were there? A. I would say there were 20 or 25 on the steps; there was a tight knot of people blocking the sidewalk.

Q. Were they demonstrating or picketing? A. They were not there demonstrating and I didn't recognize any of them, some of them were newsmen.

Q. They were not demonstrating or picketing were they? A. They were not.

Mr. Wells: That's all if the Court please (App. 170-172). See also (App. 144-145, 146-7, 161-2, 162, 174, 193-4, 275-6).

This testimony describing the crowds who gathered obstructing and blocking the courthouse was never contradicted. It is of course perfectly clear that the Mississippi authorities were not concerned with the fact of obstruction of the sidewalks and court entrance but rather with the fact that, the white "obstructors" were not civil rights demonstrators. And yet the majority below has found that "the blocking of the sidewalks and entrances and interfering with the free use of the courthouse sidewalks and entrances are the gravamen of the offense" (App. 44).

The irony in the portion of the majority opinion below which is addressed to the evidence of selective enforcement of the statute is extraordinary. The majority below wrote:

"Plaintiffs also say that the action of City (not County) authorities in permitting the use of the streets for school parades and the like, a practice customarily

> enjoyed by the community as a part of ordinary community activities, participated in by all races, constitutes selective enforcement of the statute and this invalidates it. We cannot agree with this argument. We are not here dealing with parades carried on by common consent on the public streets" (App. 48).

The lower court perhaps inadvertently has placed its finger on the heart of the problem. Appellants' activities were not "a part of ordinary community activities." They were not "a practice customarily enjoyed by the community". However, House Bill 546 does not contain, on its face, an exception for "school parades and the like". Clearly, even if it had contained such an exception, the statute would violate on its face, the Equal Protection Clause of the Fourteenth Amendment. See the concurring opinion of Mr. Justice Black in *Cox* v. *Louisiana, supra.* But more fundamentally, when the right of freedom of expression of Negro citizens is relegated to a second-class position below "school parades and the like" because such expression is not engaged in "by common consent" of the community then the protection which the federal constitution affords to those expressing unpopular views becomes totally meaningless.

As Mr. Justice Black wrote in *Cox* v. *Louisiana, supra,* on reviewing the convictions for obstructing public passages,

> "I believe that the First and Fourteenth Amendments require that if the streets of a town are open to some views, they must be open to all . . . And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allow-

ing other groups to use the streets to voice opinions on other subjects, also amounts, I think to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." 379 U. S. at 580-581.

This record evidence together with the concessions of the state officials which demonstrate beyond any question the selective enforcement of the Mississippi statute were not before this Court on the original appeal. The evidence was developed and the concessions made for the first time in the testimonial hearing on the remand. Thus, the question of the legal consequences which now flow from this total pattern of selective enforcement comes to this Court as a wholly *de novo* matter. Neither the *per curiam* opinion, nor the two dissenting opinions in the former proceedings before this Court reach this question.

We would suggest that although there have recently been sharp divisions within the Court as to limits of permissible conduct within the boundaries of the First Amendment, cf. *Brown* v. *Louisiana, supra,* and *Adderly* v. *Florida, supra,* there has been striking unanimity in both majority and dissenting opinions as to the fundamental infirmity under the First and Fourteenth Amendments of statutes which suffer from "the vice of discriminatory enforcement" *Brown* v. *Louisiana, supra,* at p. 151 (opinion of Mr. Justice Black, joined in by Justices Harlan, Stewart and Clark).

For example, Mr. Justice Black has suggested on several occasions that a state may have the constitutional power to "bar all picketing on its streets and highways". See *Cox* v. *Louisiana,* 379 U. S. at 575; *Labor Board* v. *Fruit & Vegetable Packers,* 377 U. S. 58, 76; *Cameron* v. *Johnson,*

dissenting opinion at p. 742. The majority of the Court has regarded this as an open question. See *Cox* v. *Louisiana,* 379 U. S. at 555. But Mr. Justice Black has strongly rejected as unconstitutional under both the First and Fourteenth Amendments any statute purporting to regulate or prohibit picketing or demonstrating which is selectively enforced against certain groups or types of picketing. This is the clear meaning of his concurring opinion in *Cox,* 379 U. S. at 580. As the Justice so sharply pointed out, the selective enforcement of the Louisiana statute means that "Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets". 379 U. S. at 581. These words of Mr. Justice Black in *Cox* apply with striking force to the new record in *Cameron.* Here now, as in *Cox,* Mississippi is "trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss". 379 U. S. at 581. And here, as in *Cox,* the conclusion is inevitable that this is "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments". 379 U. S. at 581. And furthermore as in *Cox,* "city officials despite this statute have permitted favored groups . . . to block the streets with their gatherings". 379 U. S. at 581. This, as Justice Black concluded in *Cox,* is "an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment". 379 U. S. at 581. This new record testimony and concessions of selective enforcement in the hearing below now invoke the constitutional conclusions of Mr. Justice Black in his *Cox* concurring opinion.[47] See also Mr. Justice Black's dissenting opinion in *Brown* v. *Louisiana, supra.*[48]

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[47] It should be pointed out that Mr. Justice Stewart, who joined Mr. Justice Black in his *Cameron* dissent, also joined the majority

The recent decision of the Court in *Adderly* v. *Florida*, 385 U. S. 39 (1966) is instructive in this respect. Although the Court divided sharply on the question of the applicability of the First Amendment to the conduct of the petitioners on the record presented, cf. the opinion of Mr. Justice Black for the majority of the Court, 385 U. S. at p. 40, with the dissenting opinion of Mr. Justice Douglas, 385 U. S. at p. 48, the majority carefully reaffirms the conclusions of *Cox* v. *Louisiana* in respect to the constitutional vice of the selective enforcement of a statute. Thus the majority opinion points out that in the *Adderly* record "there is no evidence at all that on any other occasion had similarly large groups of the public been permitted to gather on this portion of the jail grounds for any purpose" 385 U. S. at 47.[49] Acordingly the *Adderly* majority con-

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in *Cox* in striking down the "obstruction" conviction based upon the concessions of selective enforcement. In all, seven members of the Court clearly agreed that a conceded pattern of selective enforcement renders a statute in the area of free expression violative of the First and Fourteenth Amendments. Mr. Justice White and Mr. Justice Harlan held back from the *Cox* conclusions concerning selective enforcement on the ground that the question was not "urged or litigated by the parties either in this Court or the courts below". They suggested that "the parties have had no opportunity to develop or to refute the factual basis underlying the Court's rationale". 379 U. S. at 592, 593. Of course, here the parties have had full opportunity to develop and to refute the factual basis underlying the conclusion of "selective enforcement."

[48] In *Brown*, Mr. Justice Black distinguished his concurring vote in *Cox* from his dissent in *Brown* on the absence of evidence of selective enforcement, pointing out that "furthermore the vice of discriminatory enforcement which contaminates the 'public street' phase of the statute, does not beset the statute's applicability to activity in public buildings", *supra* at p. 151.

[49] The majority opinion in *Adderly* here restates in Footnote 6, 385 U. S. at 47, the insistence of the *Cox* Court that "properly drawn" statutes permitting officials to regulate the use of the streets be enforced "with uniformity of method of treatment . . . free from improper or inappropriate considerations and from unfair discrimination".

cludes that "Nothing in the Constitution of the United States prevents Florida from *even-handed enforcement* of its general trespass statute . . ." 385 U. S. at 47 (emphasis added).

The record now before the Court reveals that Mississippi has not engaged in "even-handed enforcement" of the statute here challenged. Cf. *Adderly* v. *Florida, supra.* Rather, the statute is infested with "the vice of discriminatory enforcement" *Brown* v. *Louisiana,* 383 U. S. at 151, and the pattern of enforcement is one of "invidious discrimination," *Cox* v. *Louisiana,* 379 U. S. at 581. If such a statute is now to be given constitutional sanction and if federal power is denied to protect citizens from the devastating impact of such selective enforcement of a criminal statute in the area of First Amendment liberties, cf. *Cox* v. *Louisiana, supra* and *Dombrowski* v. *Pfister, supra,* then the somber warning of the four dissenting Justices in *Adderly* that "by allowing these orderly and civilized protests against injustice to be suppressed, we only increase the forces of frustration which the conditions of second-class citizenship are generating among us", assumes new and serious urgency.

**b. The insertion of the word "unreasonably" in the statute raises new questions of unconstitutional vagueness and overbreadth not before this Court on the original appeal**

Subsequent to the filing of the complaint and the original hearings below, the Mississippi legislature amended the statute by inserting the word "unreasonably" so that the text now reads, "so as to obstruct or *unreasonably* interfere" (App. 259). The constitutional effect of this amendment was not considered by the original three-judge court,

and in fact this Court on the first appeal considered the statute only in its original form prior to amendment. See text of statute quoted in full in the dissenting opinion of Mr. Justice Black.[50] 381 U. S. at 743, 749.

We would suggest that the addition of the word "unreasonably" in this prohibitory statute raises new and serious questions of unconstitutional vagueness in the area of free expression beyond those considered by the members of the Court who touched upon the constitutional questions in their opinions in the first appeal. And we would suggest that this new dimension in the constitutional problem now brings the statute fully into the sweep of the majority and concurring opinions in *Cox* v. *Louisiana*, holding the Louisiana breach of the peace statute on its face "so broad as to be unconstitutionally vague under the First and Fourteenth Amendments". 379 U. S. at 576.

The constitutional impact of the insertion of the word "unreasonably" into the statute is most graphically illustrated by the following colloquy during the hearing below with Mr. Dukes, the law officer responsible for the enforcement of the statute in Forrest County:

> "Q. Well now, Mr. Dukes, you are a law enforcement official of the county are you not? A. I am Prosecuting Attorney.
>
> Q. That's right. Now you are required to advise these law enforcement officials like Mr. Gray as to the law are you not? A. Yes sir.

[50] The text of the statute quoted by Mr. Justice Black and the basis of his opinion is the original unamended form of the statute which omits the word "unreasonably". The district court on the remand took judicial notice of the new wording (App. 103-4, Exh. D-5).

Q. Now if these people were walking four feet apart would you advise Mr. Gray that they were violating this statute? A. If they were walking four feet apart?

Q. Yes sir. A. I don't know, I would have to see it first.

Q. Well, what if they were walking— A. (Interrupting) We set no scale as to 3 feet, 4 feet or 2 feet as such. The general thing I guess you would say that if they were walking so close together that it was it would have prevented a person from reasonably going through the line then they would have—

Q. (Interrupting) Well how do you reasonably go through a line, Mr. Dukes? A. Well, the question of what is reasonable I believe, Mr. Smith, is one that people differ on.

Q. That's right, something that I could think would be reasonable you might not think so reasonable is that right? A. That's right" (App. 257-258).

See, also, App. 259, 260, 262, 281-282.

This colloquy presents the heart of the constitutional problem of vagueness in the First Amendment area. Cf. *Ashton* v. *Kentucky*, 384 U. S. 145 (1966). If "the question of what is reasonable" is "one that people differ on", and if "unreasonably" becomes the dividing line between prohibited and permitted activity, then in truth, "such a statute does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat". See Mr. Justice Black, concurring in striking down the Louisiana breach of the peace statute in *Cox* v. *Louisiana*, 379 U. S. at 579. The recent insertion of the word "unreasonably" now

makes it crystal clear that "this kind of statute provides a perfect device to arrest people whose views do not suit the policeman or his superiors, while leaving free to talk anyone with whose views the police agree". Mr. Justice Black, *supra*, at 579. See also *Feiner* v. *New York*, 340 U. S. 315, 321 (dissenting opinion). Whatever one may say about the unconstitutional vagueness of the statute on its face prior to the inclusion of the word "unreasonably", cf. the dissenting opinion of Mr. Justice Black in *Cameron*, with the dissenting opinions below of Circuit Judge Rives,[11] it is now perfectly clear that the insertion of "unreasonably" as the dividing line between permitted and prohibited activity, renders the statute void on its face for vagueness under *both* the approaches of Mr. Justice Black, 381 U. S. 472, and Circuit Judge Rives (App. 41 and App. 77). The entire question of the right to engage in activities within the penumbra of the First Amendment has now wholly passed to the policeman who must apply his own subjective understanding of what is "reasonable". The sensitive question of the right of citizens to exercise First Amendment liberties now turns on a "policeman [who] makes a decision on his own personal judgment" that the picketing or marching is "unreasonable" interference. 379 U. S. at 559. The testimony of Mr. Dukes,

[11] Circuit Judge Rives in his original dissenting opinion would have held that it would be "difficult to conceive of a statute drawn in broader or more vague and sweeping terms than here under attack. In my opinion, the statute is so clearly unconstitutional that this case is hardly 'one required . . . to be heard and determined by a district court of three judges,'" 244 F. Supp. at 846. In his dissenting opinion after the remand hearing Circuit Judge Rives wrote that the record testimony required a conclusion that "the application of the statute in this case illustrates how vague the statute really is and compels the conclusion that it is unconstitutional on its face" (App. 75).

the Prosecuting Attorney, as well as Deputy Sheriff Morgan as to the subjective determinations they go through to decide whether picketing or marching is "unreasonable" interference, R. 294, 298, 303, 305, 337, 338, dramatically illustrate the truth of Mr. Justice Black's words in *Cox*, that such a statute provides for "government by the moment-to-moment opinions of a policeman on his beat." 379 U. S. at 559.

There are no precise narrowly drawn standards in the statute to guide the arresting officer as to when a citizen who is picketing or marching is "unreasonably" interfering with free ingress or egress. Cf. *Edwards* v. *South Carolina*, 372 U. S. 229. Nor are there any administrative rules or regulations. Everything is left to the discretion and judgment of the arresting officer. He alone must decide without standards or criteria what is the "unreasonable" interference. In the words of Mr. Justice Black in *Cox*, "in this situation I think *Edwards* v. *South Carolina* and other such cases invalidating statutes for vagueness are controlling". 379 U. S. 579.

Moreover, as Circuit Judge Rives points out in his dissenting opinion below, the record now before the Court demonstrates dramatically the fact that Mississippi now has "by a broad, vague statute given policemen an unlimited power to order people off the streets, not to enforce a specific, non-discriminatory state statute forbidding patrolling and picketing but rather whenever a policeman makes a decision on his own personal judgment . . ." *Cox* v. *Louisiana*, 379 U. S. at 579. (Opinion of Mr. Justice Black.) Putting aside the question, which we will discuss later, as to whether the picketing on the morning of April 10th could possibly support a constitutional application

of the statute, see Point II d, *infra*, and Exhibits P-1, 2 and 4 (App. 95, 96 and 97), not even the lower court majority maintains that the arrests that afternoon of Mrs. Williams and the nine youngsters (App. 183), or the arrests on the next morning of seven demonstrators (App. 200) or the final arrests on May 18 of nine demonstrators (App. 203-04) were based upon any conceivable claim of "obstructing" any sidewalks or entrances. The state put no evidence in at all of any "obstruction" during these episodes. The majority below disposed of the question simply by ignoring these episodes. We do not understand anyone to seriously contend that the simple, peaceful picketing on the afternoon of April 10th, the morning of April 11th, and on May 18th was not constitutionally protected. *Edwards* v. *South Carolina*, 372 U. S. 229. A statute which on its face and as construed by the enforcing officers purports to authorize this extraordinary invasion of the ability of American citizens to "exercise . . . these basic constitutional rights in their most pristine and classic form" *Edwards* v. *South Carolina*, 372 U. S. at 235, is "unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly" *Cox* v. *Louisiana*, 379 U. S. at 552.

Whether the addition of the word "unreasonably" now introduces the constitutional vice of vagueness and overbreadth into an otherwise acceptable statute, *cf.* Mr. Justice Black dissenting in *Cameron*, 381 U. S. at 742, and Mr. Justice White dissenting, 381 U. S. at 757, or whether it merely reinforces the conclusion that the statute as originally written was overly broad and vague, *cf.* the dissenting opinion of Circuit Judge Rives in *Cameron* and the majority opinion of Mr. Justice Goldberg for the Court in *Cox*, we would suggest that it is now perfectly clear that

the Mississippi statute as amended is constitutionally invalid under "*Edwards* v. *South Carolina* and other such cases invalidating statutes for vagueness". 379 U. S. at 579.[52] This is a statute which turns over to the policeman unlimited power based upon his own personal judgment as to what is "reasonable", to decide what views may be expressed on the streets. This the Constitution prohibits. *Edward* v. *South Carolina, supra; Cox* v. *Louisiana, supra.*

**c. The criteria in *Dombrowski* for the exercise of federal equity power where the challenge is to an overbroad statute in the area of free expression have been fully met**

The criteria laid down in the first branch of the *Dombrowski* analysis, where the challenge is to an overbroad statute in the area of free expression have been fully met. Whatever questions may have existed concerning the constitutionality of the Mississippi law have now been laid to rest as a result of the hearing on this Court's remand.[53]

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[52] The majority of the Court in *Adderly* v. *Florida, supra,* sustained the Florida statute there under consideration from a vagueness attack on the grounds that the inclusion of the terms "with a malicious and mischievous intent" . . . "makes its meaning more understandable and clear," 385 U. S. 42, 43 and footnote 2. As Circuit Judge Rives has pointed out the Mississippi statute unlike the Florida statute "requires no specific intent," 267 F. Supp. 893. Moreover the Mississippi statute unlike the Florida trespass statute on its face intrudes on First Amendment areas, *Cox* v. *Louisiana, supra, Edwards* v. *South Carolina, supra.*

[53] In a certain sense the value of the remand becomes more apparent after a realization of the clarification and sharpening of the constitutional questions which the new record permits. Cf. *Cox* v. *Louisiana*, 379 U. S. at 591 (concurring and dissenting opinion of Mr. Justice White, joined in by Mr. Justice Harlan). Here, unlike in *Cox*, "the parties have had . . . opportunity to develop or to refute the factual basis underlying the Court's rationale," 379 U. S. at 593.

The overbreadth of this statute which occasioned the original finding of Circuit Judge Rives that "it is difficult to conceive of a statute drawn in broader or more vague and sweeping terms", is now established beyond any shadow of a doubt. Both the subsequent introduction into the face of the statute of the word "unreasonably" and the striking new testimony concerning the subjective approach to selective enforcement which the statute permits have, as we have seen above, illustrated once again the fundamental considerations underlying the doctrine of unconstitutional overbreadth in the area of the First Amendment. This record, perhaps more vividly than any other recently developed, helps to explain the deep concern of the Court expressed first in *Button* and then restated in *Dombrowski*, with the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application". *NAACP* v. *Button*, 371 U. S. at 433; *Dombrowski* v. *Pfister*, 380 U. S. at 487.

At the heart of this concern is the stark realization that an overbroad statute in the area of free expression results in turning over the most precious freedoms of American citizens to the subjective mercies of "the moment-to-moment opinions of a policeman on his beat". Mr. Justice Black concurring in *Cox*, 379 U. S. at 579. Statutes of this type permit the state to marshal "the full force of its criminal law to enforce its social philosophy through the policeman's club". *Bush* v. *New Orleans School Board*, 194 F. Supp. 182 (three-judge district court for the Eastern District of Louisiana, opinion by Circuit Judge Rives).[54] But the right to

[54] It is interesting that the Court in *Dombrowski* in developing the concept of the "chilling effect upon the exercise of First Amendment rights," which flows from the threatened enforcement of overbroad laws in the area of free expression, specifically relies upon the opinion of the three-judge district court in *Bush* v. *New Orleans School Board, supra.* See *Dombrowski*, at p. 487.

exercise these liberties may not turn upon the subjective whim of a policeman who will tend to enforce the "social philosophy" of the state, *Bush* v. *New Orleans School Board, supra,* or as litigation in this Court has so often shown in recent years, upon the opinions of the "politically dominant white community". *NAACP* v. *Button, supra.* These rights must stand on far firmer ground, for as this Court has reminded us in *Cox* v. *Louisiana,* "maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy". 379 U. S. at 552.

This Court has consistently reiterated the present and immediate dangers which flow from an overbroad statute in the area of the First Amendment which "lends itself to selective enforcement against unpopular causes", *NAACP* v. *Button, supra* at p. 415.

In his opinion for the Court in *Shuttlesworth* v. *Birmingham,* 382 U. S. 87 (1965) Mr. Justice Stewart discussed carefully the "constitutional vice" of an overbroad statute:

> "It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat' Cox v. Louisiana, 379 U. S. 536, 579, (Separate opinion of Mr. Justice Black). Instinct with its ever present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state". 382 U. S. at 90.

Only last Term the Court reemphasized in *Keyishian* v. *Board of Regents,* 385 U. S. 589, 609 (1967) that

> "Where statutes have an overbroad sweep, just as where they are vague, 'the hazard of loss or substantial im-

> pairment of those precious rights may be critical,' Dombrowski v. Pfister, supra, at 486, 85 S. Ct. at 1120, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe."

And in *Elfbrandt* v. *Russell,* 384 U. S. 11, 18-19 (1966), the Court once again reminded that

> "Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker,* 364 U. S. 479, 488. And see *Louisiana* v. *N. A. A. C. P.,* 366 U. S. 293, 296-297."

and that

> "As we said in *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 432-433:
>
> > 'The objectionable quality of . . . overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . .' "

Only this Term of Court the Court again had the occasion to condemn, in the area of the First Amendment, "an overbreadth that makes possible oppressive or capricious application . . ." *Whitehill* v. *Elkins,* #25 Oct. Term 1967 (November 6, 1967, 36 LW 4006).

The record below which has so graphically illustrated the vice of unconstitutional overbreadth which results in turning over the protection of fundamental liberties to the subjective predilections of police authorities, also has demonstrated in a striking fashion the evils of selective enforcement which a broad prohibitory statute in the area of free expression permits. *NAACP* v. *Button, supra.*

As Circuit Judge Rives has pointed out in his opinion below, in *Cox* v. *Louisiana,* "the operative fact that made the statute unconstitutional was the overly-broad reach that allowed city officials to choose which demonstrations would be permitted" (App. 79). Judge Rives' careful analysis of the record below led him to conclude "In the instant case, the same condition prevails" (App. 80). For as Judge Rives points out, without contradiction by the majority:

> "A single picket could be viewed as obstructing ingress and egress because for an instant he blocked entrance 'A' or 'B' to the Court House. Such an application of section 2318.5 is no more unlikely than that 10 persons would be so charged when they could only block free and unfettered access to 'A' or 'B' for an instant and leave it unblocked for substantial periods. These arrests were made at a time when not a single person desired access to entrances 'A' or 'B'. What the Supreme Court said in *Cox (I),* I think, is equally applicable here (379 U. S. at 557-558, 85 S. Ct. at 466)." (App. 80).

This analysis of the record leads Judge Rives to conclude:

> "Perhaps the Constitution allows broader power to be vested in public officials where they have showed them-

selves to be 'consistent and just,' with a 'uniformity of method,' 'free from improper' 'considerations' or 'unfair discrimination,' but the record in the present case clearly will not support such a grant. If we are not blinded by the one large group of pickets arrested, but take the entire record, we must see to what great abuse this broad grant of power is subject. This is a case of selective enforcement. While not all pickets were arrested on each occasion, the arrests were frequent enough to have the desired effect. By May 18 this 'nuisance' was eliminated. If there is anything 'consistent' or if any 'uniformity' appears in this record, it is that section 2318.5 was consistently used to harass the civil rights' movement in Hattiesburg" (App. 81).

The record developed at the remand hearing has revealed with stark clarity "the setting in which the statute operates". *NAACP* v. *Button, supra.* This is a statute "overly broad" in the area of "free expression" which is "susceptible of sweeping and improper application". *Dombrowski* v. *Pfister, supra.* Attempts to enforce such a statute which stands condemned under the opinions of this Court from *Edwards* v. *South Carolina,* to *Cox* v. *Louisiana, Keyishian* v. *Board of Regents* and *Whitehill* v. *Elkins* in this Term of Court, classically invoke the equitable powers of the federal courts under the first branch of *Dombrowski.* See Point II(a) *supra.* Efforts to enforce such a statute have "a chilling effect upon the exercise of First Amendment rights" and require the protective intervention of a federal court of equity. *Dombrowski* v. *Pfister, supra.*

**d. The Mississippi statute is being "applied for the purpose of discouraging protected activities" *Dombrowski* v. *Pfister*, 380 U. S. at 490**

As we have demonstrated above the criteria for the invocation of federal injunctive relief under the first branch of *Dombrowski* have been fully met. However, we suggest that the record of the remand hearing also vividly demonstrates that the criteria for equitable relief established in the second branch of the *Dombrowski* analysis equally apply in this case. As we have discussed previously, Point II, 1, *supra, Dombrowski* also holds that federal injunctive relief is appropriate where state criminal statutes, possibly valid on their face, are being "applied for the purpose of discouraging protected activities," 380 U. S. at 490. Such proceedings have a "chilling effect upon the exercise of First Amendment rights" and federal equity power is properly invoked. 380 U. S. at 490.

The record of the recent hearing on the remand reveals beyond any possible question that the efforts to enforce the Mississippi statute have been made here without any real expectation of securing valid convictions but rather in an effort to "harass and discourage" citizens from "asserting and attempting to vindicate . . . constitutional rights." 380 U. S. at 482.

A careful reading of the testimony adduced by both the appellants and appellees at the October hearing reveals that there is surprisingly little conflict in the testimony as to the actual facts involved in the State's effort to enforce this statute. As Circuit Judge Coleman remarked at the conclusion of the hearing, "There's not much actual conflict in the testimony. There is a conflict in conclusions but there's not much conflict about what happened" (App.

284). We are in substantial agreement with this analysis of the record. We would suggest that a reading of the relatively uncontested record reveals in a striking fashion that the enforcement of the statute had little or no relationship to any legitimate objectives of the state but had as its sole purpose the discouragement of protected constitutional activities.[55]

**(i) *The record evidence reveals that the enforcement of the statute was not related to actual "obstruction" or "interference", but solely involved efforts to penalize constitutionally protected activities***

The virtually uncontested evidence reveals an extraordinary situation. The actual arrests under the statute had little or nothing to do with any actual "obstruction" or "interference" with public streets or the "egress" or "ingress" to entrance to public buildings. The record indicates that on the occasions of the arrests on April 10th, 11th and May 18th, there was no actual obstruction of egress or ingress or of public streets by the civil rights pickets whatsoever. The record testimony is clear and insistent that there was no such obstruction, that no persons were ever prevented from entering or leaving the courthouse. See Statement of Facts, *supra,* and opinions of Judge Rives (App. 41, 58). See also (App. 114, 119, 120, 131, 132, 141, 142, 155, 159, 160, 161, 169, 170).

The State was simply unable to obtain any evidence whatsoever of any actual obstruction or interference with ingress

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[55] As Mr. Justice Stewart wrote for the Court in *Edwards* v. *South Carolina,* 372 U. S. at 235, " . . . it remains our duty in a case such as this to make an independent examination of the whole record." *Blackburn* v. *Alabama,* 361 U. S. 199; 205 n. 5; *Pennekamp* v. *Florida,* 328 U. S. 331, 335; *Fiske* v. *Kansas,* 274 U. S. 380, 385, 386.

or egress on the crucial day of April 10th. On questioning by Judge Rives, Mr. Dukes, the County prosecutor, who was present during the arrests on April 10th (App. 222), testified that no personal complaints were made to him by anyone that they had undertaken to gain access to the courthouse and that access had been blocked (App. 267). More than this, Judge Rives asked Mr. Dukes the following:

> "By Judge Rives:
>
> "Did you see anybody who was actually trying to get into the courthouse have their access blocked?" (App. 267)

In answer to this crucial question Mr. Dukes had only one response. The only person he could recollect, and as to that he said, "I can't say positively" (App. 268), was a Mrs. Burkett, whom he told the court, "is one of the proposed witnesses here today [who] attempted to leave her office and go into the courthouse and could not do so." (App. 267). The State relied exclusively on this episode concerning Mrs. Burkett, an official in the Home Demonstration Office, which was near the little garden area around which the pickets walked as the only actual evidence of "obstruction" or "interference" with egress or ingress on the first crucial day of April 10th.[56]

Hundreds of people were present to watch the expected arrests on April 10th. Mr. Dukes himself was present.

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[56] Thus, Mr. Wells on cross-examination of Plaintiff's witness, Rev. Vaux, asked:

> "Didn't [you] know *as a matter of fact* that she tried to come out of her office to go around and go up in the County Agent's office that morning and could not get out?" (App. 155) (Emphasis added.) See also App. 168.

And yet the only evidence that anyone was "obstructed" or "interfered with" in getting into or out of the courthouse which the State could muster up was this story about Mrs. Burkett who, according to counsel for the State, "tried to come out of her office" and "could not get out" (App. 168).

The simple fact of the matter, however, appears to be that Mrs. Burkett did come out of her office that morning and was able to pass through the picket line and get to her destination. This was her own testimony on direct examination for the State (App. 268-270). Her testimony is very clear. She was able to leave her office that morning, she was able to get to her destination in the County Clerk's office, she was not blocked in her office and she did "get out". As a matter of fact, she testified that she passed *through* the picket line by "weaving back and forth" (App. 270), and reached her destination. Circuit Judge Rives has analyzed this testimony carefully in his dissenting opinion (App. 76), and we discuss this episode in some detail, only because it illustrates so vividly the underlying reality that the arrests on April 10th and the days following had nothing whatsoever to do with "obstructing" the entrances to the courthouse. This was purely an afterthought on the part of the State. In fact, there was no actual obstruction whatsoever, as even their own witness on the subject could have told them.

On this type of evidence it is inconceivable that the State, within the meaning of *Dombrowski,* could have had "any hope of ultimate success," or any "expectation of securing valid convictions."[57] 380 U. S. at 490. With all

[57] It is significant that convictions for "obstructing" sidewalks or entrances to public buildings will not stand unless the evidence shows "substantial" or "serious" obstruction or interference. See,

the resources of the State available the only evidence of actual or personal obstruction or interference, other than the purely subjective opinions of the prosecutor, Mr. Dukes, and the arresting officer, Deputy Sheriff Morgan (App. 279), was the testimony of Mrs. Burkett, and she testified, contrary to prior inferences in the record by counsel for the State, she was *not* kept in her office, but did succeed in passing through the line and in proceeding to her normal destination. See Statement of Facts, *supra*. Any "obstructions" convictions for violation of the statute based on this testimony would obviously be void as violative of due process under *Thompson* v. *Louisville*, 362 U. S. 199. See also *Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965).

The fact that the enforcement of the statute had nothing to do with the supposed objectives of the statute, obstruction or interference, *cf.* the finding of the majority below that the "gravamen of the offense" was "blocking" and "interfering" (App. 44) is most dramatically illustrated by the events of the *afternoon* arrests on April 10th (App. 182-183), the arrests the next day (App. 209) and the arrests on May 18th (App. 263-264).

The entire "theory" behind the State's explanation for the sudden enforcement of the statute on Friday, April 10th was that the previous picketing had been relatively "small" and had not obstructed or interfered with ingress or egress to the courthouse, but when the picketing became much "larger" on Friday morning, at that point the State ordered the arrests. The events of Friday afternoon explode this attempted explanation. Throughout its presen-

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for example, *People* v. *Carcel*, 3 N. Y. 2d 327, 144 N. E. 2d 81; *People* v. *Nixson*, 248 N. Y. 182, 161 N. E. 463; cf. *Edwards* v. *South Carolina* and *Cox* v. *Louisiana*, both *supra*.

tation of the day's events at the remand hearing the State talked solely about the *morning* arrests. See (App. 168). It is understandable why the State sought to avoid the events of that afternoon, the next day, and May 18th. If the theory was that the reason for the arrests in the morning was the large number of demonstrators who walked too closely together, figures varying from 28 to 40 (App. 168), it becomes impossible to understand why Mrs. Williams and nine school children were arrested in the afternoon (App. 182-185), why seven demonstrators were arrested the following day, and why nine were arrested on May 18th.

The reluctance of the State to "remember" the subsequent arrests is quite understandable. It is impossible to justify these arrests in terms of large numbers of people who were now suddenly obstructing the entrances. The only possible inference which can be drawn is that, in truth, both the morning, and subsequent afternoon arrests occurred because the plaintiffs were picketing and the State wanted to stop the picketing. After the afternoon arrests of Mrs. Williams and the nine students it becomes impossible to suggest that the arrests occurred because of an *increase* in the number of demonstrators resulting in obstruction of ingress and egress. This theory of why the statute was enforced could only have been advanced in the absence of the afternoon arrests, the arrests the following morning, and the arrests on May 18th. The actual record restores the situation to its blunt reality. On April 10th the State had decided to use the just enacted statute simply to stop all picketing. "Obstruction" of ingress and egress was a convenient afterthought which now runs afoul of the "forgotten" facts of the subsequent arrests.

The simple fact of the matter is that as in *Edwards* v. *South Carolina,* "the circumstances in this case reflect an exercise of . . . basic constitutional rights in their most pristine and classic form". 372 U. S. at 235. It is difficult to visualize a more "classic form" of the exercise of First Amendment rights than the conduct which Mississippi seeks to discourage through the application of this statute. Cf. *Dombrowski* v. *Pfister,* 380 U. S. at 490. We would ask the Court to consider the photographs of the picketing on the morning of April 10th which are part of the record (App. 95, 96, 98). These pictures were taken by the State and originally were part of their case (App. 117). They were taken "a short time, a very short time prior to the arrests" (App. 117). They were introduced by the appellants into the remand hearing "without objection" by the appellees (App. 117). These pictures portray a form of dignified peaceful expression of important social ideas which is at the very heart of the First Amendment. *Edwards* v. *South Carolina; Cox* v. *Louisiana; Brown* v. *Louisiana,* all *supra.* The words of Mr. Justice Stewart in *Edwards* are directly applicable here. These appellants "felt aggrieved" by laws of Mississippi which "prohibited Negro privileges in this State"—in this case the right to vote guaranteed to them by the Constitution of the United States. They "peaceably assembled" at the place of voter registration, the city courthouse, and "there peaceably expressed their grievances". 372 U. S. at 235. "There was no violence on their part." 372 U. S. at 236. As in *Edwards* this is an exercise of First Amendment rights "in their most pristine and classic form." 372 U. S. at 235. Mississippi, in *Cameron,* no more than South Carolina in *Edwards* may use state power to punish or discourage "petitioners' constitutionally protected rights of free speech, free assembly and freedom to

petition for redress of their grievances" 372 U. S. at 235. If the words of *Dombrowski* have any meaning, they have meaning here. This Mississippi statute is openly being "applied for the purpose of discouraging protected activities" 380 U. S. at 490. Federal injunctive power is required or else "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski* v. *Pfister,* 380 U. S. at 486.

Nothing could be clearer than the simple inescapable fact that these Negro and white citizens were peacefully exercising their fundamental constitutional rights and that the purpose of the passage of the statute and its immediate application to the appellants two days after its enactment was to discourage "protected activities". 380 U. S. at 490. Mr. Justice Fortas' description of the complex of Louisiana cases in which this Court has recently reviewed that State's efforts to utilize its statutes to restrict civil rights activities, in his opinion announcing the judgment of the Court in *Brown* v. *Louisiana,* is much in point here.

> "In each of these cases the demonstration was orderly. In each, the purpose was to protest the denial to Negroes of rights guaranteed them by states and federal constitutions and to petition their governments for redress of grievances. In none was there evidence that the participants planned or intended disorder. In none were there circumstances which might have led to a breach of the peace chargeable to the protesting participants." 383 U. S. at 133.

Here, all the activities of the appellants from January through May were "orderly"; throughout all this activity "the purpose was to protest the denial to Negroes of

rights guaranteed them by state and federal constitutions and to petition their governments for redress of grievances". And as in the Louisiana cases described by Justice Fortas, here also in none of these activities "was there evidence that the participants planned or intended disorder". Cf. *Brown v. Louisiana, supra* at 133.

The conclusion impelled by this record is the same drawn by Mr. Justice Fortas in *Brown*:

> "The statute was deliberately and purposefully applied solely to terminate the reasonable, orderly and limited exercise of the right to protest the unconstitutional segregation of a public facility. Interference with this right, so exercised, by state action, is intolerable under our Constitution." 383 U. S. at 142.

Here, the statute was applied to "terminate the reasonable, orderly and limited exercise of the right to protest" Negro discrimination in the right to vote prohibited by the Fifteenth Amendment. As in *Brown*, interference with this right is "intolerable under our Constitution." We cannot conceive of a situation more appropriately calling for the exercise of federal equity power under the criteria of the second branch of *Dombrowski*.

(ii) ***The failure of the authorities to warn the demonstrators that they were obstructing the entrances to the courthouse further indicates that "obstruction" was not the reason for the arrests, but rather the "discouraging of protected activities".*** **Dombrowski v. Pfister**

One of the clearest indications throughout the entire hearing that the enforcement of the statute really had very little to do with the problem of "obstruction" or "interference" was the fact that the arresting authorities, Mr. Dukes, Sheriff Gray, or his deputies, never really attempted to explain to the demonstrators that they were "obstructing any entrances" and never warned them of such obstructions (App. 123, 124, 132, 163, 177, 178, 182, 200, 201, 221). No one on April 10th received any complaints from the police that they were blocking the entrances (App. 123, 124, 221). This emerges very clearly throughout the record. For example, see the following colloquy between the Court and appellants' witness, Reverend Mehl:

> "Judge Rives: Were you warned to disperse or what warning was given to you before you were arrested?
>
> "The Witness: There was no warning given sir.
>
> "Judge Rives: Describe the circumstances of the actual arrest?
>
> "The Witness: Well, as we were walking around the court yard I guess you would call it in a very quiet and orderly fashion Mr. Gray came over and split the picket line and said to those who were on his left follow me.
>
> "Judge Rives: Had he told you before that that you were obstructing the entrance to the courthouse or interfering in any way with the passage of people?

"The Witness: No, he hadn't and then the picket line followed him when he said follow me we began to follow him and he took us immediately into the jail which is behind the courthouse" [58] (App. 163).

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[58] See the discussion with appellants' witness Rev. Vaux, who was recalled by the court:

"Judge Rives: Reverend Vaux, I would like to ask you just one or two questions concerning the morning of the arrests. Will you tell us the circumstances just preceding the arrest what warning was given, if any, and what how you were directed, what the circumstances were, how many times you had gone around the little quadrangle or circle whatever it is and what warning was given and all the circumstances as far as you can.

"The Witness: How far back shall I go sir?

"Judge Rives: Just the morning of the arrest.

"Judge Cox: Immediately preceding the arrest.

"Judge Rives: Immediately preceding the arrest.

"The Witness: Could I start on the picket line or should I back up further.

"Judge Rives: Were you given any warning before you got on the picket line?

"The Witness: Oh no.

"Judge Rives: Just start.

"The Witness: On the picket line walking single file and we marched around two full cycles and saying that I would be the front of the line another half cycle or three-quarters of a cycle to the side of the court house and at that time the arrest there was a wall of men and the direction was to just walk around into the jail. I really don't recall any specific comments, they didn't say that we were arrested or . . .

"Judge Rives: Well, preceding that did Sheriff Gray or anyone else warn you against obstructing entrances to the court house or unreasonably interfering with traffic or anything of that kind?

"The Witness: Not that morning.

"Judge Rives: The afternoon before I understand the statute had been read or were you present?

"The Witness: I wasn't present in the group but it was read, yes sir.

"Judge Rives: But that morning you say no warning was given except direction after you walked around twice?

Adequate warnings by the arresting officers that the conduct complained of does in fact "obstruct" or "interfere" may well be a prerequisite to the constitutional sustaining of a conviction under such statutes, see for example *Cox* v. *Louisiana, supra,* at p. 570.

As Mr. Justice Black remarked in *Feiner* v. *New York,* 340 U. S. 315, 327, "at least where time allows, courtesy and explanation of commands are basic elements of good official conduct in a democratic society". And, as Mr. Justice Brennan commented in his concurring opinion in *Brown* v. *Louisiana,* 383 U. S. at 148, "petitioners might have reasonably believed that they were being rejected only because they were Negroes seeking to exercise their constitutional rights".

Here, the total lack of any meaningful warnings demonstrates the lack of concern on the part of the arresting officers with whether the conduct really obstructed anyone at all. As a matter of fact there was hardly enough time at all for the officers to observe whether the picketing Friday morning on April 10th would actually have interfered with anyone. The actual picketing apparently occurred for only five to ten minutes before it was totally prohibited (App. 124-5). There was barely enough time for

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"The Witness: That's right, no warning was given to me.

"Judge Rives: Just what was said to you at the time you were directed to go a different direction?

"The Witness: I don't recall any of the words. There were several men there and I don't recall any verbal words at all, it was just a direction and I asked one of the officials what is the charge they said I wouldn't want to repeat the statement they said about it you will find out later" (App. 177-178).

See also the testimony of plaintiff's witness Mrs. Connor at App. 221.

the pickets to make more than two circles around the little garden area (App. 123-4). The absence of any adequate warning that the conduct obstructed ingress or egress thus highlights the fact that the arresting officers were concerned that morning not with correcting "obstruction" *but with stopping all picketing.*

Again the uncontradicted testimony of Mrs. Williams in respect to the afternoon picketing undercuts even the tentative suggestion of Mr. Dukes that the Sheriff gave some sort of warning about "obstruction" in the morning (App. 250-251). The State made no effort to contradict Mrs. Williams's testimony that when she and the nine students were arrested the "warning" they received was "he told us you march so well this way now march that way and we marched the way he told us and we marched on to the Forrest County Court House jailhouse" (App. 182).

**(iii) *The record further shows that the state authorities had in practice sanctioned the type of activity for which appellants were then arrested***

One of the most unusual aspects of the record testimony was the revelation that the actual area in which the civil rights demonstrators marched had been designated by the city authorities as an area in which they were permitted to march (App. 114, 128, 197, 224, 245-6, 248). Until the day of the arrests the actual area of picketing around the small garden area to the side of the courthouse had been marked off by the authorities with barricades as the *only permissible* place to march (App. 114-5, 245-6). Mr. Dukes himself testified that the barricades set up by the police designated an area in which people could picket which would "not block" the main entrance to the courthouse:

*"By Mr. Wells:*

> Q. Well, now after these big marches and this great group was any effort made to set up some barricades and outline a place where they could picket? A. It was absolutely necessary, Mr. Wells, because the manner in which they originally picketed or marched completly blocked the front entrance of the court house and being in January and tax paying time we had to make some arrangements for our people to get to the court house so barricades were set up on the north and south side of the Main sidewalk into the court house blocking that area off so that it would not block the main entrance into the court house and in some areas a rope was attached to a portion of the barricade whereby we more or less prohibited the general public from going into this area and these people allowed to picket unmolested within that given area."

The picture which emerges from the testimony is very clear. When the major demonstrations of January developed the Hattiesburg police decided to limit the areas available to the demonstrators to a small area on the side of the courthouse which did not obstruct the main entrances (App. 246). Picketing here was perfectly permissible (App. 246). However, the authorities finally decided that even this limited picketing which they themselves had sanctioned was not to be tolerated. The plaintiffs were then arrested for "obstructing" in the very area which they had been told was the *only* area they could picket in. This conduct on the part of the authorities, in the words of this Court in *Cox* v. *Louisiana,* is "an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was

available to him." 379 U. S. at p. 571. Any convictions under these circumstances would obviously fall under the rule of *Cox* v. *Louisiana*.[59] As the Court there said, "The Due Process clause does not permit convictions to be obtained under such circumstances." 379 U. S. at 571. The rule of *Cox* applies here with even greater force. It would be a travesty on the most elementary concepts of fairness to permit convictions to stand for demonstrating in the very area the city *itself* had designated as permissible as not obstructing the entrance to the courthouse. Such convictions would never stand under *Cox*. Such prosecutions are not pressed with any "real expectation of ultimate success." *Dombrowski* v. *Pfister, supra,* at 490. They are obviously not pressed to alleviate any legitimate concern with "obstructing" ingress or egress to public buildings. Otherwise, the demonstrators would never have been told previously that they could demonstrate in that confined area. Moreover, it may be asked why the authorities took *down* the barricades just before the arrests if the presence of the barricades had *facilitated* ingress and egress to the building. *Cf.* testimony of Mr. Dukes (App. 246). The answer is simple. The purpose of the arrests was not to cure a non-existent "obstruction" to egress or ingress. It was to discourage the appellants from any picketing at all. Such action is "intolerable under our Constitution". *Brown* v. *Louisiana, supra,* at p. 142.

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[59] The facts in *Cox* in respect to the third branch of convictions there involved, the courthouse arrests, are almost identical to those of the April 10th arrests. In effect the Court says in *Cox*, the appellants had been told by the City that it was permissible to demonstrate where they were. See 379 U. S. at 571.

**(iv) *The enforcement of the Mississippi statute had a "chilling effect upon the exercise of fundamental constitutional rights," requiring the invocation of federal injunctive relief under the criteria of* Dombrowski**

The record of the remand hearing graphically illustrates the "chilling effect" upon the exercise of fundamental constitutional rights which results from planned prosecutorial misuse of state criminal statutes for the purpose of discouraging protected activities. Cf. *Dombrowski* v. *Pfister, supra,* at 490; *Cameron* v. *Johnson, supra,* at 755 (dissenting opinion of Mr. Justice White, and *Cameron* v. *Johnson, supra* at 748 (dissenting opinion of Mr. Justice Black).

The record reveals clearly and without contradiction the objectives of the picketing conducted from January 1964 through May in Hattiesburg. Reverend Brown, one of appellant's witnesses, placed the objective in these terms:

> "A. Well, the reason of the picketing as far as I understood was to assist the Negro people in several ways, one of which was to give to the Negro community a source of strength and confidence that there were people who cared about their movement and their desire to register, that perhaps our being there might be possibly a deterrent to any violence that might accrue, that also the picket line as I understood it would also be a word to the community at large concerning the state of unrest in the Negro community concerning this right and others that all was not well in the Negro community" (App. 112-113).

Reverend Vaux another witness for appellants placed the purpose of the picketing this way:

"The purpose of the picket line was to lend moral support and visible support to our voter registration program" (App. 141).[60]

The intimate relationship between the picketing and the voter registration activities was described clearly by Reverend Cameron, one of the leaders of Hattiesburg Negro voter registration movement:

"The purpose of the picketing was to lend faith and encouragement to the local Negro community because of the fear and so many of the citizens in the Negro community felt that without some help that they would not be able to go to the registrar's office to register to vote and with many testimonies from them that after they were able to see white ministers and laymen on the picket line" (App. 191).

The impact of the enforcement of the Mississippi statute upon both the exercise of these First Amendment and Fifteenth Amendment rights was extremely serious. The picketing dwindled down to handfuls of people until the middle of May when a second series of arrests cut it off completely (App. 222, 227, 228-9, 204, 205, 206, 235). Registration to vote efforts likewise palled (App. 204, 205, 235).

There can be no question that the picketing, regarded as serious and important to the voter registration drive, ended abruptly as a result of the enforcement of the statute. It was suggested by the State at the hearing, however, that another reason for the termination of the picketing might be found in a "spurt" in voter registration activity in May of 1964, resulting in a "new" situation in Forrest

[60] See also App. 155, 159, 165, 185, 187, 188, 190, 191, 192.

County. *Cf.* (App. 211-218). In fact the State intimated at one point that the present figure (as of the date of the hearing) of some 3000 Negro registered voters in Forrest County illustrates the absence of a "chilling effect" upon the exercise of constitutional rights after the enforcement of the statute. This inference totally misrepresents the actual situation in Forrest County for many months after the initial enforcement of the state statute. No "spurt" in voter registration occurred in May of 1964.

As late as June of 1965 the Court of Appeals for the Fifth Circuit found it necessary to grant extraordinary relief to alleviate the disenfranchisement of Negro citizens in Forrest County. *United States* v. *Lynd,* 349 F. 2d 785 (5 Cir., 1965) and *United States* v. *Lynd,* 349 F. 2d 790 (5 Cir., 1965). In the latter opinion, the Registrar of the County, Mr. Lynd, was held in contempt of the Circuit. The voting situation in Forrest County was described in June, 1965 in this manner: "Negroes have been denied this precious Constitutional right because they are Negroes." In addition, the Court pointed out that "the denial of these rights—at one and the same time a violation of the Constitution and orders of this Court—demands a correction." And the Court said in June, 1965, "At the snail's pace to date, it will take decades to eradicate the evil." 349 F. 2d at 793.

The "chilling effect" of the groundless prosecutions initiated by the State under House Bill 546 continues. If it has worn off at all, it is only because of the corrective effect of the federal stay of prosecutions which has continually been in effect since the institution of this case, together with the action of the Fifth Circuit in *Lynd* and the passage of the 1965 Voting Rights Act. If this Court should

now decline to continue the stay of these proceedings and the future enforcement of the statute, the "chilling effect" will undoubtedly intensify once again. First Amendment liberties must be protected whether or not the National Government has independently taken steps to help to eradicate the great and old evils which the exercise of First Amendment rights in this situation were designed to achieve. The objectives of Congress in passing the Voting Act of 1965 as well as the purpose of the Court of Appeals in imposing its contempt order against the Registrar of Forrest County require for their full success the active participation of the Negro citizens of the State in the electoral and registration processes. See, Report, United States Commission on Civil Rights, The Voting Rights Act, 1965. This in turn calls for the full and free exercise of fundamental First Amendment rights by the Negro citizens of the State. A statute, the enforcement of which casts a chilling effect upon the exercise of these liberties, cannot be tolerated.

The lower court majority, in December of 1966, advanced an extraordinary reason for "declining injunctive or declaratory relief in this case" (App. 49). Conceding that the picketing by appellants was "for the purpose of obtaining the right to vote and to encourage others to do so" (App. 49) the lower court concludes that because of the passage of the Voting Rights Act of 1965, and the decision of this Court in *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966) upholding its validity "picketing to obtain the vote or to encourage others to do so is a thing of the past" (App. 50).

This conclusion which in effect would deny appellants federal protection under the mandate of this Court in

*Dombrowski* on a theory that the objectives the appellants sought to achieve through the exercise of their constitutional rights have in fact already been fully achieved, not only flies in the face of the realities of present day Mississippi. See, for example, United States Commission on Civil Rights, Hearings on Voting, Jackson, Mississippi, 1965. It wholly ignores the nature of the ancient evil which the institution of Negro slavery first planted in this country three hundred years ago. As this Court recently pointed out in *South Carolina* v. *Katzenbach, supra,* the very case the lower court relies upon, discrimination against Negro citizens in voting is "an insidious and pervasive evil which had been perpetrated in certain parts of our country through unremitting and ingenious defiance of the Constitution." 382 U. S. at 309. (Opinion of the Chief Justice for the Court.) Accordingly, the Court went on to point out that Congress concluded there was a necessity for "sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment" 387 U. S. at 309.

But this "insidious and pervasive evil" will not be eliminated overnight solely by the intervention of national legislation. The full and uninhibited participation of Negro citizens in every aspect of the political processes will be required if the hope expressed by this Court in *South Carolina* v. *Katzenbach* is to be achieved—that "we may finally look forward to the day when truly the 'right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude' ". 383 U. S. at 337. This objective, as the United States Commission on Civil Rights has pointed out, can be achieved

only through a process of self-organization and activity on the part of the Negro citizens themselves, rather than reliance upon the new legislation by itself.

Thus the Commission wrote in its first major report *after* the passage of the Voting Rights Act:

> "The registration of Negro citizens has been prevented or deterred by a number of factors.
>
> . . .
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> Racial violence related to civil rights activities is another factor which has limited applications in some counties with examiners: The killing of seminarian Jonathan Daniels in Lowndes County, Alabama, on August 20 and the acquittal of his killer on September 30 appear to have been the single most important factor in reducing Negro applicants in that county. It is symbolic of conditions there that a pick-up truck with a rifle visibly displayed has been parked daily immediately outside the examiner's office since the opening of the office. Registration workers in the county have reported increasing threats against their lives and continued efforts to intimidate resident Negro leaders.
>
> The decline in registration following the initial outpouring of applicants also is attributable to lack of political organization and low motivation. Negroes, who for generations have played no part in the political processes of their communities, cannot be expected suddenly to embrace all of the responsibilities of citizenship. Registration drives have been effective in some places. Negroes have been persuaded to attend meetings where registration and voting procedures are explained, and to present themselves for registration,

> even at the risk of incurring possible disapproval by the white community and by their employers. *But while these drives have had a substantial effect, the inhibiting results of mass disfranchisement are not easily overcome. Continued community and governmental activity is necessary so that Negro citizens will learn that the ballot is now available to them.* (Emphasis added.) United States Commission on Civil Rights, "The Voting Rights Act".

This then is the short answer to the unusual suggestion of the lower court that injunctive relief should be denied to these appellants because in some magic way the "insidious and pervasive evil" of Mississippi's one hundred year old "unremitting and ingenious defiance of the Constitution", has now been suddenly eliminated by Act of Congress. For as the Commission states, unfortunately "the inhibiting results of mass disfranchisement are not easily overcome". *The Voting Rights Act, supra.* "Racial violence", "intimidation", "disapproval by the white community and their employers" *cf.* the Commission's Report, *supra,* are still unhappily part of "today's problems" *United States* v. *Price, supra.* Thus "continued community and governmental activity is necessary so that Negro citizens will learn that the ballot is now available to them" Report, *supra.* The free and unfettered utilization of the fundamental liberties of the First Amendment remains critically necessary to the Negro citizens of Mississippi if the objectives of the Congress expressed in the 1965 Act are to be fulfilled. State legislation which is selectively enforced against Negro citizens for the purpose of discouraging this free exercise of basic freedoms, necessary if the Congressional purpose is to be achieved, violates the spirit

and letter of the 1965 Act itself. See opinion of Circuit Judge Rives below (App. 77). The injunctive relief here sought remains pressingly necessary.[61]

The record in this case now brings before the Court a classic situation for the invocation of the criteria for injunctive relief set forth in the second branch of the *Dombrowski* analysis. The Mississippi statute is being applied "for the purpose of discouraging protected activities", 380 U. S. at 490. The arrests and prosecutions are part of an "unconstitutional scheme—to harass and discourage" citizens of Mississippi from "asserting and attempting to vindicate . . . . constitutional rights", 380 U. S. at 482. The statute is concededly and openly selectively enforced only

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[61] The suggestion of the majority below that any necessity for the free exercise by Mississippi citizens of fundamental constitutional rights in order to guarantee full compliance with the Fifteenth Amendment and the Voting Act of 1965 is "a thing of the past" is of course unsupported by the record or by what this Court knows concerning the realities of present day life in that state. *Cf.* for example, the comments of the District Judge in *United States* v. *Price,* on remand from this Court's decision in *United States* v. *Price, supra,* in revoking the bail of certain convicted defendants in that proceeding. See New York Times, Oct. 21st, 1967. See also New York Times, Nov. 21, 1967, p. 95, article from Jackson, Mississippi: "The weekend bombing of a church leader's home prompted the City today to form a 'bomb squad' of specially trained officers . . . The bombing was the second in this area in five days. Last Wednesday the parsonage of a Negro minister, the Rev. Allen Johnson of Laurel, was severely damaged by an early morning blast. Mr. Johnson is head of a voter project of the National Association for the Advancement of Colored People." See also, New York Times, Nov. 23rd, 1967, article from Jackson, Mississippi, p. 50: "Rabbi Perry E. Nussbaum said today he believed the bombing of his home last night had been a direct attempt on his life. He also asserted that apathy by the general public had helped create the current 'reign of terror' in Mississippi. Rabbi Nussbaum and his wife narrowly escaped injury in the explosion that shattered his three-bedroom home shortly after 11 p.m. It was the fifth bombing in the state within the last two months and the fourth in the

against citizens who seek to exercise fundamental federal rights to achieve objectives of freedom and equality for Negro citizens in the political life of the country guaranteed to them under the Constitution. The Mississippi authorities utilizing a statute which "bears the hallmark of a police state", 382 U. S. at 90, have entrapped citizens into conduct they now seek to penalize. This "planned prosecutorial activity", 381 U. S. at 755, is not pressed with any "real expectation of ultimate success", 380 U. S. at 490, but merely for "the purpose of discouraging protected activity", 380 U. S. at 490. In short these state officials are "engaging in unlawful conduct which deprives persons of their federally guaranteed statutory or constitutional rights". 381 U. S. at 749. Under any analysis of the criteria established for injunctive relief under the second branch of *Dombrowski,* federal equity power is proper and necessary here.

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Jackson area. Investigators speculated that the series of bombings had been executed by a secret band of terrorists, possibly in retaliation against the recent arrests and trials of Ku Klux Klansmen on civil rights charges . . . . In New York, the Union of American Hebrew Congregations sent a telegram to Federal officials asking them to take firm action to end the 'reign of violence, terror and intimidation in Mississippi' ", at p. 50. In any event if in the future injunctive relief presently granted requires modification, as this Court pointed out in *Dombrowski,* "The settled rule of our cases is that district courts retain power to modify injunctions in light of changed circumstances. *System Federation* v. *Wright,* 364 U. S. 642; *Chrysler Corp.* v. *United States,* 316 U. S. 556; *United States* v. *Swift & Co.,* 286 U. S. 106", 380 U. S. at 492.

## CONCLUSION

**The judgment below should be reversed with directions to the three-judge statutory Court to issue the federal injunctive relief prayed for restraining the enforcement of House Bill No. 546 of the Laws of Mississippi of 1964 and the criminal proceedings presently pending brought under the authority of that statute.**

Respectfully submitted,

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